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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 570

TOMOYA KAWAKITA,

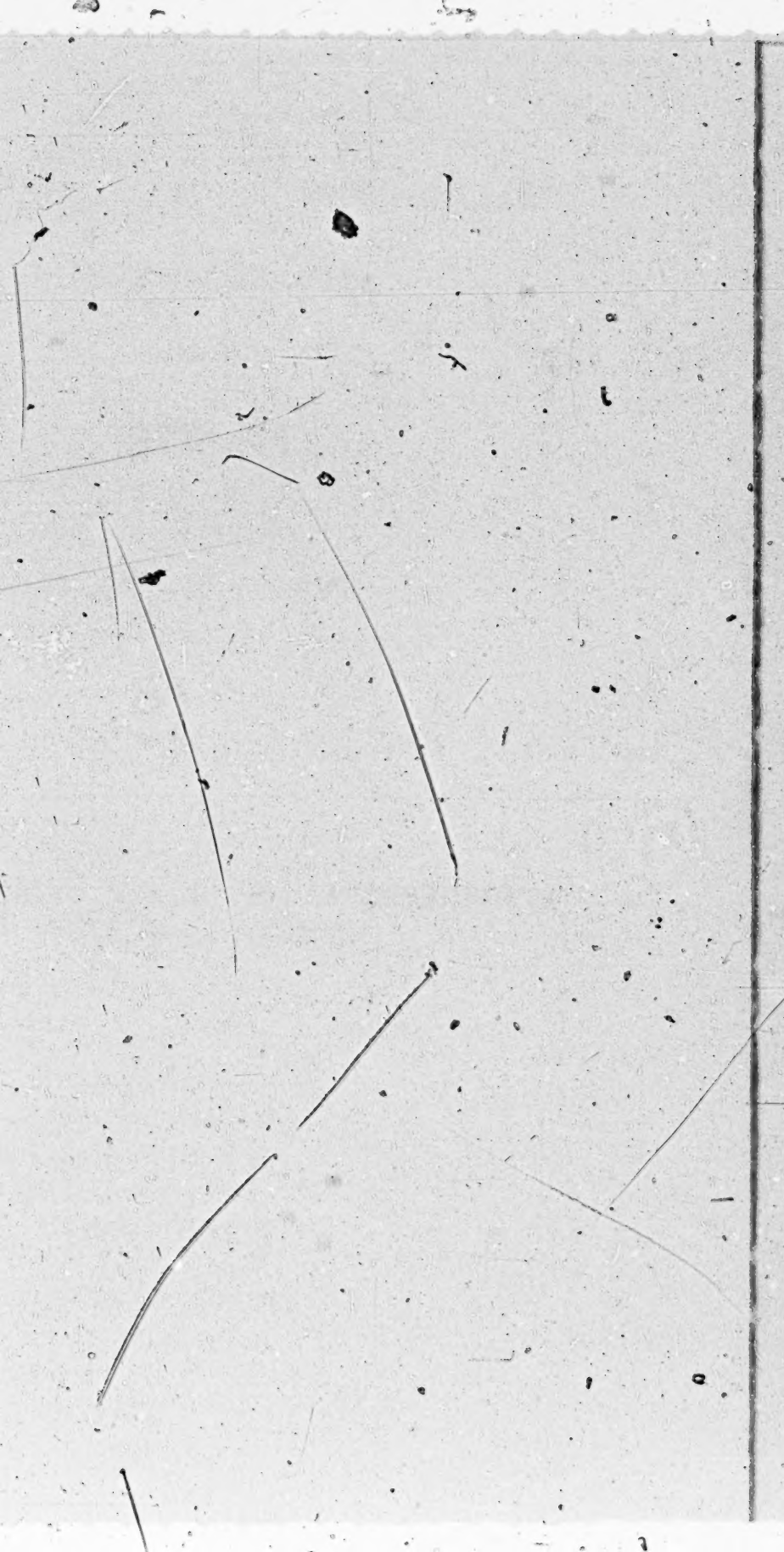
Petitioner,

vs.

UNITED STATES OF AMERICA

OPENING BRIEF ON BEHALF OF APPELLANT TOMOYA KAWAKITA

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 570

TOMOYA KAWAKITA,

Petitioner,

vs.

UNITED STATES OF AMERICA

OPENING BRIEF ON BEHALF OF APPELLANT

This is the Opening Brief on behalf of appellant, Tomoya Kawakita, from the judgment and sentence of death allegedly for treason pronounced in the United States District Court for the Southern District of California, Central Division.

Jurisdiction

Jurisdiction is conferred by the Constitution of the United States, Article III, Section 3; by Title 18, subdivision 1, U. S. Codes, 1946, and by Title 1254(1), Title 28 New Federal Judiciary Code. See also Rules 37(b)2 and 45(a) F. R. Crim. P.

The judgment was pronounced by the District Court of the United States, Southern District of California, Central

Division, on October 5, 1948. The Court of Appeals for the Ninth Circuit affirmed June 22, 1951 (R. 559). Rehearing denied September 24, 1951 (R. 586). This court granted Certiorari on February 4th, 1952.

Constitutional Provisions, Statutes and Regulations Involved

These, because of their length, are in the appendix. They are:

Article III, Section 3, U. S. Constitution;
Title 18, subdivision 1 (1946 Edition), U. S. Code;
Sections 800 and 808 Nationality Code;
Constitutional provision regarding the Law of Nations—International Law and Treaties being a part of the Supreme Law of the Land.
The Section of the Immigration Code regarding the presumption of expatriation.
Certain Regulations in the Treaties regarding prisoners of war;
State Department Regulations regarding dual citizenship, and
Immigration Regulation 315.9.

Opinions Below

The opinions below may be found in 96 Fed. Supp. 824, and 190 Fed. (2d) 506, and Cl. Tr. 521-558.[1]

Summary Statement of Facts

The appellant, Tomoya Kawakita, was found guilty by a jury of eight overt acts of "treason" after nine days of deliberation, two jury requests through its foreman to be discharged (R. 5622-4), and a mandate by the trial judge to the jury that it was their duty to agree (R. 5621), and

[1] Clerk's Transcript is designated Cl. R. and Reporter's Transcript R.

that the minority should listen to the majority, with a disposition to be convinced (R. 5629-30).

The indictment alleged that the offense and all of the overt acts occurred in the Japanese Prisoner of war camp at Oeyama, Japan, between August 8, 1944 and August 24, 1945 by reason of the alleged mistreatment of American prisoners of war confined in the camp.

The charging part of the indictment, contained in paragraph (4) of the indictment, alleged that the defendant adhered to the enemy, Japan, and gave them aid and comfort—that the adherence and aid and comfort "consisted of serving as an interpreter and foreman at the said prisoner of war camp at Oeyama and at the said open pit ore mine and smelter, and, in his said capacity as interpreter and foreman, of compelling members of the armed forces of the United States who were then and there held by the Japanese Government as prisoners of war to perform labor at the said open pit ore mine and smelter, and of directing and assisting the Japanese military forces having charge of the prisoners of war at said Camp Oeyama in the imposition of discipline and punishment on said members of the armed forces of the United States, and of beating, abusing, and attempting to destroy the morale and the physical and mental well-being of, the same members of the armed forces of the United States.

> "The aforesaid activities of said defendant Tomoya Kawakita were intended to and did assist the Japanese Government to utilize members of the armed forces of the United States to produce minerals, metals, and products to be used in the manufacture of arms, material, and munitions of war for the Japanese Government and were further intended to and did assist the Japanese military authorities to control and discipline members of the armed forces of the United States who were then and there prisoners of war at said Camp Oeyama and to render them abjectly subservient."

The American prisoners of war had been delivered to the camp by order of the Japanese government, not Kawakita, in August of 1944 (R. Tr. 157, *et seq.*). At that time Kawakita was in China on a Japanese passport (R. 4059). He did not return until October, 1944, at that time he found himself drafted as a Japanese National by the Japanese government in his job (R. 4001; Exhibits A, AB and Z). He tried to change his job but was told he could not (R. 4061). The camp was established by Japan pursuant to treaty arrangements between the United States and Japan to abide by the Treaty of the Hague, entered into through the Swiss government, *mutatis mutandis* (See Exhibit CW). The prisoners of war were prisoners—a disarmed labor battalion, and all under the direction and control of the military personnel of Japan, that directed its movements and imposed the punishments (R. 199 to 205). It was conceded during the trial that the Japanese government established the camp and it was under Japanese Military personnel; that the control and discipline of the prisoners were enforced by the military personnel, although witnesses testified that the defendant assisted in such punishment after it commenced. It was conceded that Japan was at all times a Sovereign Nation, that the camp was run by the Japanese military men and that rules and regulations for the government of prisoners of war were in force. It was further conceded and the court instructed the jury that Kawakita was at all times mentioned herein a Japanese citizen (R. 5504).

The indictment on which appellant was finally tried had fifteen overt acts. Two were withdrawn—one by the United States Attorney and one by the Court. The jury found against the appellant on eight overt acts, which are set out in detail in the Appendix with the testimony of each of the witnesses as to each of the overt acts summarized. These overt acts were overt acts (a), (b), (c), (d), (g), (i), (j) and

(k) in the indictment. The jury did not reach any agreement as to the five overt acts, and they were never withdrawn and a request to return the jury to pass on these overt acts was denied.

In furtherance of the "adherence" and the "giving of aid and comfort by him" to the enemy, it was alleged that Kawakita, on a date in May 1945, did direct the work of Phillip D. Toland as a prisoner of war to compel him to remove rock from the roadbed and track of a railroad used in the operation of the smelter, and did kick the said Phillip D. Toland to compel him to greater exertion in this work [2] (overt act (a), appendix).

Overt act (b) alleged that the defendant, during the latter part of April, 1945, directed and participated in the punishment of one J. C. Grant, a prisoner of war, who was knocked into the drain or cesspool of said camp *by his Japanese guards* and was repeatedly and violently struck and beaten by the defendant and the Japanese guards as he attempted to get out of the pool.

Grant testified that the occurrence took place in the latter part of April or the first part of May (R. 1915, 1916), after he had broken into the Red Cross storeroom and had taken Red Cross supplies, ate his fill, and got cigarettes and chocolate bars and came outside. (R. 1915, 1916). That Japanese Sergeants Akamatsu or Ichiba ordered him over to the cesspool after his theft was discovered. He did not identify

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[2] The evidence of the government differed from the allegations in the indictment. Toland said that the alleged occurrence was some time in June, 1945. He momentarily stopped working because he had become dizzy and had not been working for about three minutes. (R. 1644, R. 1676, 1671). Dr. LeMoyne Bleich, an American doctor in charge of the prisoners of war, testified that from April 21st until August his card record showed that Toland was on light work duty in the garden and not working in connection with any railroad or rock pile or smelter. (R. 3352, et seq.).

the defendant as having done anything to him. He did not see the defendant. (R. 1919).[3]

Overt act (c) alleged during December, 1944, at Camp Oeyama, the defendant Kawakita and the Japanese guards lined up about thirty members of the armed forces who were prisoners of war in Camp Oeyama and as punishment of said prisoners of war for cutting up government blankets and making mittens and snow linings from pieces of blanket, did at said time and place strike and beat them and force them to strike and beat each other. The testimony is that the prisoners of war were told that they had misused Japanese Government property. An Englishman went down the line slapping each one (R. Tr. 735). The men were told to face each other in two ranks and to punch each other. This was done by the Japanese guards (R. Tr. 735, 754 inclusive). The defendant also struck some of the men. No other punishment was given for cutting up the blankets (R. Tr. 762, 1141). The guards told the Englishman to go up and down the line and slap each one (R. Tr. 2540, et seq.). Dr. Bleich, the American physician at the camp, did not remember who was present (R. Tr. 3384). Meiji Fujisawa (R. Tr. 3641) could not remember who was present except British NCA Yerling. He did not see the defendant there (R. Tr. 3650). Japanese Sgt. Ichiba said that any person destroying Japanese Government property would be severely punished and they will punish each other (R. Tr. 3650). The defendant denied that he was present. He said that in December 1944, he was working at the mine, which was an hour away by train and was not at the camp (R. Tr. 4107).

Overt act (d) charged that during August, 1945, Thomas J. O'Connor, a prisoner of war, was punished for breach of

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[3] The work records of Tomoya Kawakita and the company records show that on March 1st, 1945 Kawakita was transferred to clerical work in the electrical department where he was engaged from eight o'clock in the morning until five in the afternoon.

camp rules by being assaulted, beaten and struck and knocked into a drain or cesspool, causing the said Thomas J. O'Connor temporarily to lose his reason.

O'Connor testified that some time "around the end of June or middle—beginning of August or July, end of June or beginning of July, around that time" of 1945, Rael, Floyd and he broke into the warehouse around 1:00 o'clock in the afternoon. That Rael and Floyd were caught "right off the bat" (R. Tr. 2100, et seq.). Akamatsu, the defendant, Ichiba and a crippled Japanese soldier were striking Floyd and Rael, who divulged his name about 10 minutes later, and he was taken out in front of the cesspool where Ichiba hit him. Akamatsu hit him and knocked him into the pool. The defendant struck him the third time (R. Tr. 2105-2106). After that they just took turns. He admitted that in a statement given to the Navy he only mentioned Ichiba and Akamatsu and not the defendant. Meiji Fujisawa (R. Tr. 3638) said he saw O'Connor get hit and knocked into the pond. He was acting as interpreter questioning Rael, who admitted taking things from the storehouse. That Ichiba and Akamatsu ordered Harvey and Tugby to make further investigation and O'Connor was brought out. That he was hit by Ichiba and Akamatsu after which Ichiba ordered Harvey to carry on, and O'Connor was shoved into the water at least a half dozen times by Harvey. He did not see the defendant there (R. Tr. 3641). The defendant denied that he hit or struck O'Connor and stated he was working at the factory as a clerk, and was not at the camp at the time (R. Tr. 4107).

Overt act (g) alleged that on a date in July or August, 1945, David R. Carrier and George W. Simpson, two prisoners of war, returned thirty minutes early from their assigned duties and were compelled by the Japanese sergeant in charge to run twice around the inner quadrangle of the buildings, and thereafter the defendant did compel David R. Carrier and George W. Simpson to run an addi-

tional four times and six times respectively around said quadrangle, because they were unable to run fast enough by reason of illness.

Carrier testified that when he came in early, the Japanese sergeant made them run around the compound (R. Tr. 369). The defendant shouted at him to "hurry up" and "catch up," and he made four extra laps after the men quit. He testified there was a Japanese standing near the defendant when he shouted at him (R. Tr. 400).

George W. Simpson testified (R. Tr. 2246) that sometime in July, 1945, he was on Montgomery's detail, which came into camp early. Ichiba told them they had come in early and to double time around the quadrangle. They had made about two laps when the defendant walked out and told him to catch up with the rest of the men and threw clods.

The defendant testified that he did not come in early with a working party in July or August, 1945, and that he had nothing to do with compelling Carrier and Simpson to run around the compound. That he was working at the factory as a clerk, his quitting time being 5 o'clock in the afternoon, and that it took him about ten minutes thereafter for him to leave (R. Tr. 4110).

Overt act (i) the Johnie T. Carter incident. It was alleged that on or about December 17, 1944, at or near the open pit ore mine, Kawakita ordered Johnie T. Carter to carry a heavy log up an ice-covered slope, and that Carter slipped and fell and received a serious spinal injury; that the defendant then and there denied him medical care and delayed his removal to Camp Oeyama for a period of approximately five hours.

Carter testified (R. Tr. 1847) that the defendant took some men out to get some logs. That he was carrying a log, it was raining and sleeting and he felt a push and fell and landed on a rail. He said he remembered nothing until he

was in the mess hall. He heard Gage ask the defendant for permission to take him into camp and the refusal.

Overt act (j) alleged that in May, 1945, the defendant at a warehouse near Camp Oeyama, did order and commit John J. Armellino, a prisoner of war and weak and emaciated, to carry for a distance of approximately 500 feet two heavy buckets of white lead instead of one bucket which Armellino had been carrying, and did then and there strike and beat the said John J. Armellino in order to compel him to perform this labor.

Armellino testified (R. Tr. 1218) that he was in the can carrying detail; that the defendant stopped him and asked him why he wasn't carrying two cans, and that Armellino replied that he was too weak, whereupon the defendant told him he would carry two cans and like it. He then took a can from another man and placed it in the witness' arms and struck him. He testified he did not carry the cans much longer; that the defendant placed him on another detail (R. Tr. 1234).

The defendant denied the incident (R. Tr. 4112). At that time, he said, he was working in the factory office as a clerk. The interpreter at the factory where Armellino was working was a man named Inouye.

Overt act (k) charged that on a date is the late spring or early summer of 1945, Kawakita participated in and assisted the Japanese military personnel of Camp Oeyama in directing and executing cruel, inhuman and degrading punishment upon Woodrow T. Shaffer, a prisoner of war, in that Shaffer was forced to kneel for several hours on a platform with a stick of bamboo placed on the inner side of the joints of his knees and told to hold his arms at length above his head and to hold a bucket of water and subsequently a heavy log, and he was then and there struck and beaten by Kawakita.

Shaffer testified (R. Tr. 2057) that in the early part of August, 1945, about four o'clock in the afternoon a Japanese guard caught a man cooking some beans and after questioning him learned that Shaffer had stolen the beans. The defendant, Ichiba, Akamatsu and several Japanese guards were there. The defendant told him to get up on the little stand, and Akamatsu placed one piece of bamboo under his knees and another under the high part of his instep and made him kneel on them. The defendant placed a bucket of water in his hands and told him to hold it up above his head without bending his elbows. When his elbows started to bend, the defendant and Akamatsu struck him with sticks. The detail from the factory came in and after they were dismissed the Japanese guard brought a log over and the defendant told him to hold that up that he couldn't spill that. He fell off the platform (R. Tr. 2057 et seq.)

Meiji Fujisawa said he saw the punishment of Shaffer for breaking into the storehouse, but he did not see the defendant there (R. Tr. 3675). The defendant denied participating in punishing Shaffer and said he was working at the warehouse office at the time from 7:30 a. m. to 5 p. m. (R. Tr. 4113).

The indictment charged that the defendant was a citizen of Japan during the period of the alleged occurrences, from August 1944 to August 1945, and that during that period he was "a person owing allegiance to the United States."

Tomoya Kawakita, the appellant, was born on September 26, 1921, at Calexico, California, United States of America (R. 4037). His father and his mother were each born in Japan and were at all times, therefore, subjects of Japan and were "Isseis" and not eligible to become citizens of the United States. At all times the parents were citizens of Japan (R. 3986).

It was stipulated by the Government during the trial, and the trial court instructed the jury, that Tomoya Kawakita was at all times mentioned herein a citizen of Japan (Clerk's Tr. 310).[4]

Under the Fourteenth Amendment to the Constitution of the United States, Tomoya Kawakita became a citizen of the United States at the time of and by reason of his birth in the United States and remained such as long as he was *subject to the jurisdiction* thereof.

Under the laws of Japan, he became a citizen of Japan by reason of the birth and citizenship of his parents in Japan and was concededly a citizen of Japan at all times mentioned in the indictment.

Kawakita's father was Yasaburo Kawakita, who maintained a grocery store in Calexico, California (R. 3986-7).

At the age of seventeen, Tomoya Kawakita made a trip to Japan with his father and obtained an American passport at that time (Exhibit 12-A). (R. 4040). The purpose then was to see his grandfather before he passed away. The grandfather was then 83 years old (R. 3989).

Kawakita went to Japan on an American passport in 1939. The passport expired two years thereafter, in 1941. It was renewed to 1942 and it then expired. There was no passport during any of the times covered by the indictment (Exhibits 2a, b, c, R. 4162-4).

While in Japan, Kawakita was persuaded to go to school at the Meiji University in preparation of a commercial field between the United States and Japan in the export and import work. The father left his son in Japan for educational purposes and returned to the United States. The father provided his son with $25.00 per month during this time to maintain him and in payment of his education (R.

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[4] Clerk's Transcript is designated Cl. R. and Reporter's Transcript R.

3992). Kawakita attended preliminary school at the Nichi-Bei Home, where he studied the Japanese language and took the entrance examination for the university. He renewed his passport, which renewal was to December 1942, at which time the passport expired (Exhibit 2a, b, c, R. 4162-4).

War having broken out on December 7th, 1941 (December 8th, 1941 Japanese calendar), Kawakita remained at the University, where he was registered as a "foreigner" and his address was given as Calexico, California. He was also registered as an alien at the local police station (R. 4051, Exhibit CR; R. 3866, et seq.).

In the meantime, Japan set up prisoners-of-war camps in Japan. Although the United States and Japan had not entered into an agreement on the Treaty of the Hague theretofore, after the outbreak of the war there was an exchange of telegrams between the United States and Japan through the Swiss government, being Telegram No. 376 dated February 7th, 1942 to the American Legation at Bern, and Telegram No. 733, February 24th, 1942, from the American Legation at Bern, wherein the Japanese Government declared that it will apply on conditions of reciprocity the Geneva Prisoners of War Convention in the treatment of prisoners of war, and insofar as the provisions of the Convention shall be answerable in the treatment of civilian internees. On the basis of these arrangements made with the Japanese Government through the Swiss Government, concerning the treatment of prisoners of war and civilian internees, the Government of the United States considered that there was a binding commitment on the part of Japan to apply the provisions of the Geneva Convention to American prisoners of war (Defendant's Exhibits CT and CW, an exchange of telegrams). And, see letter from the State Department, introduced in evidence in this case (Appendix C) expressing the State Depart-

ment's declaration that a binding treaty has been entered into regarding observance of the Treaty of the Hague. See also *Ex parte Yamashito*, 327 U. S. 1.

Japan set up Camp Oeyama, pursuant to this International Agreement. The camp was set up on a purely military basis. Several barracks or hans were established under military supervision. Japanese Military Lt. Hazama was made Camp Commandant (R. 4056), and various Japanese Military Sergeants—Sgt. Ichiba and Akamatzu—were generally in charge of the men and the discipline. The camp was at Oeyama, and the prisoners of war were sent there to work under military supervision for the Nippon Yakin Kaisha Company. This company had a nickel mine at Oeyama, at Yosa-Gun Kyoto. There was also a smelter about an hour's ride from the mine. The prisoner-of-war camp was located near the smelter. The prisoners of war camp was controlled by the Japanese military department and received its orders from it (R. 3726). All orders were given by Military Japanese Lieutenant Hazama (R. 3727).

The camp operated in strictly military fashion and had military rules and regulations for the conduct of prisoners of war, which followed the provisions of the Hague Convention, and provided for the laws and rules and regulations for the conduct of prisoners of war. The men received pay in accordance with their status, rank and rating (Testimony of Sgt. Montgomery, R. 219). The prisoners of war were a labor battalion and were subject to all of the discipline of the rules and regulations of the camp (R. 219). The Japanese Government promulgated Japanese laws, rules and regulations of prisoners of war (Exhibit CS in evidence). The prisoner of war punishment, Law No. 1, was promulgated March 9, 1942 (Article 6 of Exhibit CS, pages 77 and 78). Exhibit CT.

Kawakita was cut off from any money from the United States and from his father (R. 4048). He sought a job

through Takeo Miki. Mr. Miki sent him to the Nippon Yakin Kaisha Company, of which Saturo Mori was President (R. 471). The company had offices in Tokyo, Japan. At that time they were expecting to receive prisoners of war from Canada and Australia, and for that reason they needed someone who spoke English (R. 472). Tomoya Kawakita was hired to act as an interpreter. He had no position of authority. He was assigned to work at the camp at Oeyama in Kyoto Province (R. 473). Mr. Mori knew he could not hire any foreigner (R. 477, 478).[5] He at all times believed that Tomoya Kawakita was a Japanese National. It was conceded throughout the trial that at all times Tomoya Kawakita was a Japanese citizen.

Kawakita went to work at the mine and was assigned to interpret between the British and Canadian prisoners of war and the Japanese officials. In the summer of 1944, Kawakita went to China on a Japanese passport as a Japanese subject on behalf of bringing back some Chinese to work in another section of the company (R. 4059).

Prior to going to work for the company, on March 2nd or 3rd, 1943 (R. 4051) Kawakita was stopped by a Japanese policeman who wanted to know something about his military status. This was very similar to the procedure in the United States of stopping of young Americans by police to show their draft card. Kawakita told the policeman that he was born in the United States and was registered as a foreigner. The officer told him that he had to make an election whether he was going to be Japanese or American. The officer told him the way to do that was to have his name entered on the family Koseki or Register. This proceeding is described by Kawakita in detail (R. 4053).

[5] While there were Chinese, brought from China, working in the mine, the evidence shows they were in another area, not being worked by prisoners of war. In the prisoner of war camp the evidence shows that only the prisoners of war, or Japanese military personnel, Kawakita and Fujisawa, interpreters and Japanese nationals were permitted.

Pursuant to this proceeding, he decided to make his election. He went down to the City Hall of the City of Suzuka, where he made a formal declaration. He had his name entered by the Registrar at the City Hall, at the request of his uncle Yazaemon Kawakita, in the family Koseki; his uncle told the Registrar that this is his nephew and he desires to enter his name formally in the family Koseki as a Japanese subject (R. 4385). The Registrar asked when he was born, and Kawakita told him he was born on September 26, 1921. The Registrar asked him if it was his desire to enter his name in the family Koseki as a Japanese subject, and he told him "yes." There were entries made on the Koseki and then Kawakita took the family seal and stamped it on the record. This, according to Japanese law, was a re-affirmation of allegiance to Japan. (The deposition of the Attorney General of Japan, Exhibit A). The registrar then made three or four copies of the Koseki, which Kawakita took to the police station for removal of his name from the *alien* registration record. Upon presentation of the Koseki to the local police, and leaving it there, his name was removed from the *alien* registration and he was allowed to go about Japan as he pleased (R. 4053). From that time on the Japanese treated him entirely as a Japanese; he was not required to report to the police and he received a *Japanese* passport to go to *China* for the company.[6] He also showed the Koseki to the place where he became employed to satisfy them that he had Japanese nationality (R. 4386). Foreigners could not be hired to work in a defense plant (R. 4050). The company was then under the control of the army of Japan. Mr. Mori, the President of the Company, knew he could not hire foreigners (R. 477, 478), but Kawakita was from that time on regarded as Japanese.

[6] By giving him a Japanese passport to go to China, with whom Japan was then at war Japan showed its recognition of total allegiance of Kawakita to that country.

Mr. Takeo Miki told the defendant that the Oeyama Nickel Industrial Co., Ltd., wanted somebody who could speak English and would need him for the service (R. 4048). In July of 1943, he was interviewed by Mr. Hayakawa, General Affairs Section of the Oeyama Nickel Industry Co.; Mr. Hayakawa took his personal history and asked him if he had Japanese nationality. He told Mr. Hayakawa, "I have." He told Mr. Hayakawa his name was registered in the family Koseki at Miye Prefecture (R. 4049).

Mr. Hayakawa told him that he would need two more interpreters and Kawakita introduced Mr. Meiji Fujisawa and Mr. Inoue to Mr. Hayakawa at the main office in Tokyo. Kawakita had Japanese nationality and Mr. Inoue said that he was in the process of getting Japanese nationality (R. 4050).

Mr. Hayakawa sent Mr. Kawakita and Mr. Inoue to Oeyama. He told them that they were to interpret between the prisoners of war and the Japanese military personnel. "He told us that we were to take orders from the camp authorities, which was the military authority. He told us where we were to live" (R. 4055).

Prior to that Mr. Takeo Miki, in Tokyo, told Kawakita that the British and Canadians were coming, that the interpretation would be between British and Canadian prisoners of war.

On arriving at the camp the defendant reported to (Military) Lieutenant Hazama, who was camp commandant of the camp (R. 4056). Lieutenant Hazana told the defendant and Mr. Inoue that they were to take orders from the military authorities of the camp, and that the place where the prisoners of war were working was a military zone. He said that the defendant was to take orders, to translate or interpret between the company authorities or the military authorities and the prisoners of war. "He told us to

act in a stern, military manner and when we interpret between the prisoners of war and the Japanese military authorities in the case there is an order, when the military authorities and the Japanese foremen give orders to the prisoners of war, to interpret it in a firm and clear military voice, just as the Japanese military officer who speak English will give orders to his subordinate" (R. 4056). He also gave orders that Kawakita should speak nothing, "we should not speak anything about the war, political, and about our personal selves, otherwise it might arouse suspicion and we will be severely punished by the military authorities and even may be killed by the authorities" (R. 4057, 4105). Lt. Hazama was top man at the camp and directed all military personnel (R. 3789).

Meiji Fujisawa was required to become a Japanese National to work in the plant. He received a special permit from the army to work at the company while he was getting Japanese nationality (R. 4057). Thereafter he received Japanese Nationality by entering his name in the family register or Koseki (R. 3594).[7] The State Depart-

[7] On the question of establishing his Japanese citizenship Meiji Fujisawa, another interpreter, testified as follows [Reading from page 3594 of the Record]:

"Well, Mr. Hiyakawa asked me whether I had Japansese citizenship or not and I told him that I did not have any and he told me that the company could not hire any foreign nationals and besides the prisoner of war camp will be under the direct jurisdiction of the army, so the company could not hire any foreign nationals. And he told me that I will have to get a Japanese citizenship before the company can employ me. So I told him I will apply for Japanese citizenship and then he told me for further instructions to report to the Uataki factory in Kyoto."

Then he goes on to tell what happened there; and then I asked him a little later on:

"Well, what did you do thereafter with reference to your Japanese nationality, if anything? A. Well, my name was entered in the Koseki, not in my parents' Koseki but I had to establish a separate Koseki.

Q. You established a separate Koseki? A. Yes, sir.

Q. Were you then married? A. No, sir.

ment construed this as expatriation or a loss of American citizenship. The three interpreters then arranged their work between them, alternately, at the mine, the factory and the camp (R. 4057). In December, 1943, Kawakita was sent to the mine permanently, and the mine was a distance of about twelve miles from the camp and was arrived at by a special train.

When the defendant first came to Ceyama he moved to the Oeyama area which was the mine dormitory. Later he went to live with Kiyoshi Mori, the mine engineer (R. 4058).

In August, 1944, he went to China on a Japanese passport issued at the Miyazu police station in the County of Yoza on company business. He returned about October 23, 1944 (R. 4059). After he returned there were two different kinds of prisoners of war in the camp than had been there before. They were Americans as well as British (R. 4060). Prior to that time he had ascertained when the second group of prisoners of war came in January, 1944, that there were no American boys in the group (R. 4060).

On August 1, 1944, a law went into effect in Japan by which Japanese male population not actually in the army were *drafted* for occupational work. They were served with draft papers and they were compelled to work at the occupation to which they were assigned. They could not quit the occupation, nor transfer from it, without the consent of the government (R. 488). It was applicable only to Japanese nationals.

Q. You established a separate Koseki. Will you explain to us what you did? A. Well, I don't know—I can't recall where I went, but I think I went to the metropolitan police station and there I told them in order to work in a Japanese firm as an interpreter I would have to get Japanese citizenship, and that I came to apply.

Q. And what happened then? A. I didn't know until December that I had set up a separate Koseki.

Q. And that was December of—— A. 1943." [R. 5170-5172.]

Kawakita, as a Japenese citizen, was served with draft papers upon his return from China in the last part of October, 1944 (Exhibit Z and W). The company was also drafted by the government and became a government controlled company.

In the meantime, in August of 1944, American prisoners of war arrived at Camp Oeyama.

When Kawakita returned from China and he found that Americans were in the camp, he asked Kiyoshi Mori if he could change his job because he didn't want to interpret any more because there were American prisoners of war at the camp (R. 4061). **Mori, the mining engineer, told Kawakita that the company is under the control of the government and that the company cannot change positions, or places of work, of their own will, that he was frozen in his job** (R. 4061).

Kawakita also received the draft papers showing he had been drafted on August 15, 1944, in his absence, to work in this job and that he could not leave it, or fail to work without being severely penalized [Exhibits AB and AB-1 and Z] **and that he was like a soldier to the orders of the Japanese government.**[8]

American Sgt. James Montgomery in August, 1944, brought a group of 100 American prisoners of war to the camp from the Philippines. Sgt. Montgomery was placed in charge of American prisoners of war through orders of the Japanese Military Personnel. Sgt. Montgomery was a member of the counter-intelligence corps of the

[8] The setting in which Kawakita found himself—in Japan, in a Japanese Military camp, where only persons of Japanese nationality could be employed; where his employment was checked as to his Japanese nationality, and where everyone about him hated him as a Japanese national and thought he was a Japanese national when in fact he was, as stated in the instructions of the court to the jury, a Japanese citizen (regardless of any claimed American citizenship), we respectfully submit, is not a setting in which the overt acts found by the jury could be construed to be treason.

United States (R. 4376)—a fact unknown to the Japanese, who made him one of the bosses of the camp. He had been taken a prisoner of war in the Philippines along with many of the others. He described very much in detail the camp, its operations as a military camp, all its vocations and the work (R. 157 *et seq.*).[9] He described

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[9] [R. 203]:

Q. When you arrived at Camp Oeyama who did you report to? A. We were just marched up in front of the headquarters building.

Q. Who marched you up in front of the headquarters building? A. I marched the men under the supervision of the Japanese guards.

Q. And were those Japanese military guards? A. Well, the guards at this camp were a mixed personnel. Some were soldiers in the Japanese army and others were civilian guards. On that day I do not remember.

Q. And when you got to the camp where you were in charge of these men did they get then assigned to places that they were to sleep and to eat and to live? A. Yes, sir.

Q. During the time they were there? A. Yes.

Q. And you say that occurred about August 5, 1944? A. I believe it was August the 6th.

Q. August the 6th? A. Yes, sir.

Q. In this camp were rules posted in the camp? A. Yes, sir.

Q. Rules and regulations for its conduct, isn't that right?

[R. 204]:

A. Well, everything pertaining to the conduct of the prisoners in the camp were posted there. [Rep. Tr. Vol. III, p. 199, line 21, to p. 204, line 2.]

Q. When you arrived there, the British and Australian prisoners of war were there already, were they not? A. There were, I believe, 263 British prisoners of war at Camp Oeyama at the time I arrived, plus the 100 Americans who had arrived the day before, who had left 24 hours before the group I was with had. [Rep. Tr. Vol. III, p. 204, lines 6 to 11, incl.]

[R. 208]:

Q. When you first arrived there, Sergeant, you stated that a military officer was in charge of the camp and his name was Hazama, is that correct? A. Yes, sir.

Q. And did he remain the commandant of the camp at all times? A. Yes; during my entire stay there.

Q. And the camp was, so far as the prisoners of war were concerned, operated and supervised by the military personnel, isn't that correct?

The Court: Which military personnel?

A. He was commanding officer of the camp. He was responsible for it.

Mr. Lavine: Lt. Hazama. He was commandant of the camp. [R. 209]:

The Court: I think when you mention military personnel, you should

disciplining prisoners of war by the prisoners themselves (R. 157 *et seq.*). He also admitted he personally disciplined American prisoners of war for theft by slapping [9a] (R. 227-29).

After arrival at the camp, Camp Oeyama, the Americans were assigned to barracks, or "hans." The British and Canadians had a subordinate set up of their own for the government of the camp and the discipline of the men which was run by British Sgt. Harvey, Major Beadnell of the British forces, British Warrant Officer Tugby, and others. After the men were given about a week's rest, they were assigned to duty in the Oeyama mine.

The camp itself was run very much in military fashion and much like a prison in the United States, or a military place of confinement. There was a guardhouse at the entrance. The place was completely fenced in, the guards were on duty and no one could leave the enclosed area except under guard (R. 236). There was a guard tower

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differentiate so there will be no question. You refer then to the Japanese military personnel?

Mr. Lavine: Yes, sir; the Japanese military personnel.

The Witness: Yes, sir.

[9a] American Sergeant Ralph W. Montgomery (Recalled) testified [R. 227]:

By Mr. Lavine:

"Q. . . . At any time while you were at Oeyama camp did you at any time administer punishment to any prisoner of war? A. Yes, sir.

Q. What punishments did you administer? Well, for stealing I slapped, I think, about three men.

Q. And who were those three men, if you recall? A. One fellow was named Everett; that was his surname; another man's name was Hans; and at the moment I can't call the name of the [R. 228]: third man.

Q. What had they stolen? A. Hans had stolen about three pair of gloves and, I believe, one or two shirts. And the Japanese, when they issued clothing, they only issued one of each item to each prisoner of war, and when a man reported that items of his clothing had been stolen, why, we searched the kits of the men to determine who had taken them. And in both those instances I found the gloves and shirt in the kit of Hans, and the same thing applied to Everett. I think he had either two or three shirts that were not his property.

somewhat similar to ours in our own prisons. Prisoners of war wore numbers (R. 200).[9b]

It was governed by the Japanese military (R. 157, 208). Japanese Lieutenant Hazama was Commandant in charge. The military personnel of Japan operated and supervised it (R. 208). It had Japanese government, rules and regulations. Kawakita was under military orders at all times. (R. 4105-11.) The Japanese bowed to the Emperor every morning.

When the men would arise in the morning they formed in military fashion, they counted off like soldiers, and were sent out to their work on special trains to the mines. When they passed the guardhouse they had to salute the Japanese guards.

At the mine they were assigned to various levels of digging the earth by means of a pick and shovel, to dig up dirt that might contain nickel ore, then to load it into cars. The average quota for Japanese was 800 cars per day. (R. 3733-36). Kiyoshi Mori, the engineer in charge of the

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[9b] [R. 237] Sgt. Montgomery testified:

Q. Now, was it an offense as far as the Japanese rules or Japanese laws were concerned, for prisoners of war to take these vegetables without permission? A. Yes, we were forbade to.

Q. And if prisoners did take them without permission what was the punishment that was meted out to them? A. If they were caught in the act by the Japanese, why they were beaten; but if it [R. 238]: was determined by means of investigation who they were, why, it was usually —they were usually given their punishment by—under the auspices of Major Beadnell, Dr. Bleich, Lieutenant Bryant, and the Board of Supervisors."

. . . . . .

Sergeant Montgomery testified [R. 260] that "If the man persisted in eating what we called 'the dysentary dilcons and onions' he was usually slapped around a little bit."

[R. 318]:

Q. Sergeant, I take it you are an American citizen, aren't you? A. Yes, sir.

Q. And you have never been punished, have you, for slapping any Americans in the camp? A. No, sir.

camp, so testified. The quota set up for Americans was one-fourth of what the Japanese were required. Nevertheless, the quota being turned out was only 120 to 165 cars per day. Men would shovel the dirt containing ore into the dump cars, these cars would be dumped automatically. (R. 3733-38).

Some time in November, or December, 1944, Kawakita told Sgt. Montgomery that the men would have to make a 200 car quota. Sgt. Montgomery was also told this by Lt. Hazama (R. 3733, 3759), the military commandant. Kawakita was told to convey this information by Tamura, one of the camp authorities (R. 4079). Kawakita said he interpreted and explained orders of the military and foremen. He was only in the mine a little over four months after the Americans arrived. The balance of the time he was a clerk in the warehouse.

The men seldom made their quotas as ordered by Military Lt. Hazama, however, and continued to do only between 120 to 165 cars per day. Sgt. Montgomery denied that he told the men not to fill the quota, but indicated that was what the men agreed to do. They agreed that they would not fill the quota. His attitude was that while the Japanese "were standing over us I told the men to work" (R. 232).

The men worked around the mine from about the time of their arrival at the mine, a distance of one hour's traveling time from the camp in the special trains in which the men went, from about 8:00 o'clock in the morning to about 4.00 in the afternoon, with certain rest periods in between. Near the mine there was a medical officer, Japanese, to take care of anyone who needed emergency treatment.

The camp Doctor, Dr. Lemoyne Bleich, an American Medical Doctor, a prisoner of war, set up a complete infirmary for the care and treatment of the men. Every day he would inspect the men to determine if they were physi-

cally fit to work, and to attend to their medical needs. The Japanese supplied such medicines and supplies as were available. For a time Dr. Bleich kept a complete diary of events in the camp; he was allowed to keep a complete list of the prisoners of war and their physical condition. A complete set of cards, which the doctor kept, were introduced into evidence, and are among the exhibits. Prisoners of war set up their own "court" for the offenses. Physical punishment attended these violations. Sgt. Montgomery slapped some men for stealing. (R. 227-8.) At no time did any man ever complain to American Captain Bleich that Kawakita had mistreated or struck him. Not a single card record reflects nor does Dr. Bleich's diary mention Kawakita as having inflicted any punishment.

After Kawakita arrived from China, some time in the later part of October, 1944, he appeared at the mine as an interpreter and interpreted orders between the Japanese guards and foremen to the American soldiers. Usually, he met with the guards the night before and found what their orders were. There were from 8 to 12 foremen (R. 4062). Kawakita would then explain to the Americans what the Japanese foremen told the prisoners of war to do, and sometimes demonstrated it because it was difficult to interpret. He never did this on his own initiative, but only as requested by the foreman (R. 4061, 4063). The prisoners of war remained at the mine until March 1, 1945.

During the time that the men were at the mine Kawakita carried an injured American prisoner of war to the hospital center located near the mine on his back for treatment (R. 3792, 4082). In order to do so he had to get permission from Mr. Tamura, the foreman at the mine. He helped prisoners of war get extra food supplies in the first part of November. He brought three jo of rice from the home of Kiyoshi Mori, with Mr. Mori's permission, because the prisoners of war said they were not getting enough to eat (R. 3741-2). He

had to quit because the native Japanese population learned of it and criticized Mr. Mori (R. 4084). He also arranged extra dental attention for the prisoners and interpreted between them and the Japanese dentist (R. 3743). There were also medical facilities at the mine (R. 3743, 3792-3).

March 1, 1945, following suggestions by *Kawakita* to Kiyoshi Mori that the work at the mine was too heavy for the American prisoners of war, the American prisoners were transferred to the factory near the camp (R. 3738-9, 3767). This was considered light duty for the prisoners (R. 4098).

As Inoue was the interpreter at the factory, Kawakita was assigned as a clerk in the factory March 1, 1945 (R. 4099; Exhibit AB). (See the official company records Exhibit No. 6IDK (in English).) Kawakita acted as a bookkeeper (R. 4138) and kept charge of electrical supplies (R. 4099, 4113, 4138). A copy of those records, showing the type of work he did, is in evidence as Exhibit DK (R. 4139).

American medical orderlies were working at and around the mine. There was also a mine hospital.

From March 1st until the close of the war, and the surrender of the Japanese, to the ending of hostilities on August 10, 1945, Kawakita worked as clerk in the factory which was outside of the camp grounds. On occasions, not over once or twice a month, he would go into the camp on the orders of Lieutenant Hazama to assist Fujisawa and the Camp Commandant in interpreting letters and notes from various prisoners of war (R. 4102).

As Americans were winning the war, food was becoming scarcer and scarcer in Japan. This, likewise, affected the supplies in Camp Oeyama. The prisoners of war were also given four and five cotton blankets each for covering in their beds. There were also strict Japanese Government orders against any prisoners eating any vegetables out of the vegetable garden. The American doctor—Doctor Bleich—

himself had issued such orders because these vegetables, on account of the nature of fertilization, would make the prisoners sick. It was a serious offense to steal any of the vegetables for that reason, as well as because of the shortage of food. It was also a serious offense—it just about meant a prisoner of war's "neck" to steal or attempt to steal any food from the storehouse where it was kept (R. 257).

Two prisoners of war, J. C. Grant and Thomas J. O'Connor, admittedly burglarized the storehouse and stole scarce rationed food. Woodrow Shaffer stole beans (R. 2058). They were caught by the Japanese military authorities, who gave them prompt and severe summary punishment. Regulations covering this subject called for punishment up to the death penalty (Overt Acts b and d). O'Connor, it is alleged (Overt Act d) was struck and beaten and pushed into the fire drain or cesspool, and kept there for a time. Likewise, the same punishment was given to Grant (Overt Act b). Overt Act k, Shaffer incident. Prisoners were forbidden not only by the Japanese but by Dr. Bleich from stealing and eating vegetables. No other punishment, however, was administered for their burglary and thefts.

It is alleged that Kawakita came into the camp when these punishments were being administered by the Military in charge and that he assisted the military in the punishments being administered. These are charged as *"treasonable"* overt acts b and d and k, on which the jury convicted.

It was a very serious offense, also, for prisoners to cut up blankets or destroy any Japanese government property. Lt. Hazama ordered the prisoners to punish each other, by striking each other with their fists. This they carried on between a half an hour and an hour. Kawakita, according to the Government witnesses, came along when this was going on and allegedly assisted the Military in carrying out this punishment by observing the men and striking them

when they failed to punch each other. The jury also found this (Overt Act c) to be an act of "treason."

Two other alleged overt acts of "treason" also occurred in the military compound as punishment. Two American prisoners of war, named Carrier and Simpson, along with others, returned into the camp earlier than the time regularly fixed for their quitting work. One of the Japanese Military Officers, Sergeant Ichiba, as punishment, ordered them to run around the compound until *he told them to quit.* Carrier and Simpson lagged behind and Kawakita, who had come into the compound, was supposed to have told them to "hurry up" and catch up with the others, and they were required to run around the compound a few more times than the other prisoners, for lagging. This also was found to be an act of "treason" (Overt Act g).

The other alleged overt act was in requiring John J. Armellino to carry two buckets of paint, according to his testimony (which was the quota required of each prisoner of war to carry) when he was only physically able to carry one bucket (Overt Act j) and kicking him.

The jury, on all of the other transactions alleged, was unable to make any finding after nine days deliberation.

Right after the Japanese surrender on August 10, 1945, the Emperor made an announcement, and all of the Japanese officials listened and obeyed. They then turned the camp over to the Americans as their captors. At that time there were forty-five (45) American officers in the camp who had up to then been prisoners of war. The Senior American Officer, Major Martin, was placed in charge of the camp. The Japanese took orders from and obeyed him. Sergeant Montgomery, Chief Counter-Intelligence Officer, who had been made the "so hancho," or a sort of petty officer in charge of the Americans, by the Japanese, now acted on behalf of the Americans. At the trial he did not even remember the name of the Major who became the Commanding

Officer of the Camp (R. 251). We mention this to show how the memory fades. Also, when shown a photograph of the American officers taken at the Camp, he was not able to pick out very many of them, or give their names. He also had difficulty in identifying the Japanese personnel.

Immediately upon the Americans taking over the camp, there was a flag raising ceremony. Kawakita became the principal interpreter and helper of the Americans. He reported to camp every morning about 7:10 and stayed there until nine o'clock at night (R. 4149). He took orders from Major Martin. He arranged to get a telephone installed at the camp. He aided the released prisoners of war to get food being dropped from B-29's together with two or three officers in getting medical supplies, food and clothing around the area to the Americans, and to be sure that the Japanese civilians in the area would not steal them (R. 4150). He went to Port Maizuru, a Japanese Naval Port, to interpret to Japanese families where some supplies had been dropped on some houses and made a big hole in the home (R. 4151).

He went with Major Martin and Lt. Thompson to the Police Station at Miazu (four or five miles from the camp and factory) to set up a prophylactic station for the prisoners of war who had started sight-seeing with Japanese girls, and in order that the prisoners of war could use the station as a prophylactic station (R. 4152). A group of American officers had a big lunch at one of the big Japanese hotels, located on the shore (eight to fifteen officers were present) and they took Kawakita along to act as their interpreter and guide (R. 4152-4153). He took the men on an excursion trip and sight-seeing of the sceneries of Japan (R. 4153).

When the Americans got ready to leave, the defendant, Kawakita, and Major Martin went to see the Station Master to arrange a train, so many cars, so many coaches, so many

baggage cars, for the freight to be taken to the destination. He arranged two different groups (R. 4154). Four different coaches. He assisted the men in getting off on September 9, 1945. He was the only interpreter at the station and went to the station for that particular work. He helped load all the things that the prisoners of war wanted to take and the supplies on the trucks (R. 4154, 4155). He saw them leave about 10:30 in the morning, greeted them farewell.

After the Americans took over, they beat up at least one Japanese guard in revenge. No one at any time attempted to strike or beat Kawakita. No one at any time ever interrogated him, or charged in Japan that he had committed any acts of treason (R. 4155). Title 18, Section 3 (1946 Edition) makes it the duty of any one who has knowledge of another having committed treason to report it immediately or himself be guilty of misprision of treason.

The Japanese lieutenant, Hazama, in charge of the camp and various other Japanese personnel were taken into custody shortly thereafter, but the defendant was not taken into custody. He remained in Japan and in November of 1945, went to work with the Wakasa Kogyo Kubushiki Kaisha (R. 4155). This was an export and import company (R. 4156).

In December, 1945, the defendant went to the American Consul in Japan and asked if he could reinstate his American citizenship, or not (R. 4156). He told the Consul that he had his name entered in the family Koseki. This is corroborated by the document of the American Consul itself. The defendant told the Clerk at the American Consulate about it and he was informed that that did not affect him because he was a "dual citizen." "You are a dual national," she stated (R. 4157). Up to that time, he had not believed he was a dual national, but a Japanese national.

At all times after entering his name in the family Koseki, the defendant believed that he had *only* Japanese nation-

ality (R. 4197). After he explained to the clerk of the American Consulate he had his name entered in the family Koseki and he showed her his family Koseki, she said: "You have dual nationality" and she told him that he would be thoroughly investigated by the counter intelligence corps of the army of the General Headquarters and if he was reinstated the Counsul will notify him (R. 4157). He told her he had been working as an interpreter of the Kogyo Wakasa Kogyo Kabushiki Kaisha and he was listed as a clerk (R. 4158). She typed up an affidavit, which he signed. It was about the first part of February, 1946, that he received the letter that his status as an American was reinstated and that he was thoroughly investigated through the Counter Intelligence Corps of the General Headquarters (R. 4159). The lady at the Consulate did all of the typing. (See Exhibits 2(a) to 2(i), incl.)

The American Consulate made a finding of *dual nationality* and after two months of investigation made its conclusion and finding after he had been screened by the Counter Intelligence Corps and investigated by them [10] (R. 4171).

> "*In the opinion of this office,* he has not actively collaborated with the enemy, nor engaged in activities inimical to the best interest of the U. S. beyond the minimum necessary to earn a livelihood. A check of the records of the U. S. Army C. I. C.[11] in Japan reveals no adverse information concerning him." (R. 4174, Exhibit 2F.)

He thereafter awaited an opportunity to return to the United States. He visited Army Headquarters at least

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[10] The American consulate has the power to arrest and even try Americans abroad. Military tribunals were also operating in Japan under General Douglas MacArthur.

[11] C. I. C. is Counter Intelligence Corps. Sgt. Montgomery at the camp was a member of the Counter Intelligence Corps. This fact was first developed in the cross-examination of Sgt. Montgomery by Attorney Morris Lavine, counsel for the defendant, during the trial.

twenty times and visited the American Consulate an equal number of times (R. 4177 *et seq.*). Transportation funds were arranged for him in the United States sometime in June. In the meantime he had remained in Japan, constantly reporting to the Consulate and to the Army. No effort was ever made to arrest him, or otherwise to charge him with any offense, either of war crimes or treason.

The Consulate made a finding that the defendant "has presented evidence deemed satisfactory to overcome the presumption of expatriation," *as of the date of the finding thereof in 1946.* A passport was authorized to extend to December 31, 1947. The document was signed Meredith Weatherby, American Consul in Japan (R. 4175). The passport to return to the United States was issued June 20, 1946 (R. 4178). *On the day before that* (R. 4177) *the defendant put in an application with the Japanese Government to divest himself of Japanese nationality* (R. 4177).

Thereafter he returned to the United States. He went to live with his father at Los Angeles, California. He went to the University of Southern California, where he attended classes with a number of G. I.'s including one who had been a prisoner of war.

Thereafter, while he was in Sears, Roebuck and Company in Los Angeles, California, in September, 1946, a former prisoner of war named William Bruce, and deeply affected by his war experiences, bumped into him—not literally but actually—in the Los Angeles store. Kawawifa, so he said, had stopped him from eating a Japanese nut and had interrupted his smoking (R. 2760-2767). So upon seeing Kawakita, whom he recognized as one of his former guards in Japan, he told his wife that he had just seen someone he wanted to kill (R. 2773). His wife, he said, told him he had gone crazy (R. 2773). He followed the defendant out of the store and got the automobile license number of the car.

This was when "treason" as far as Kawakita was concerned was "born." [12]

Thereafter, Bruce reported the matter of seeing one of his Japanese guards to the Veteran's Administration and the Government and an investigation commenced of Kawakita being in the United States (R. 2774).

No one accused Kawakita of treason even then, not even Bruce and furthermore no arrest or accusation was made of him from that date for almost a year thereafter, to-wit, in June, 1947. Bruce did not even know the correct pronunciation of the defendant's name (R. 2779).

Kawakita was arrested by F. B. I. Agent Jerry Sawtelle at the home of his father in Los Angeles. There was no warrant for his arrest and he was not informed of the charge on which he was being arrested. He did not know why he was taken to the commissioner's office, where for the first time a Commissioner's warrant was issued against him on information and belief sworn to by Jerry Sawtelle. While the complaint sets forth an alleged charge of treason, it does not set forth any basis of knowledge of the F. B. I. Agent, who was never shown to have been outside of the United States.

After being held by the F. B. I. for more than two hours, Kawakita was arraigned before the magistrate, on the complaint sworn to by F. B. I. Investigator Jerry Sawtelle, who never claims to have been in Japan, or to have actually had any personal knowledge of any of the transactions.

Thereafter, Kawakita was indicted by the Grand Jury in an indictment which charged overt acts (a) to (i) as they

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[12] Bruce was not a witness to a single overt act of treason found by the jury against the defendant. His testimony regarding refusing to let him eat a nut or smoke (and for which he wanted to kill Kawakita) was admitted on the theory of intent [R. 2756]. Smoking without authority was forbidden by Article 8, page 22, Rules of Prisoner of War Camps [Ex. CS] to prevent fire hazards.

are in the present indictment. Objections to the jurisdiction of the court and to denial of the right to speedy trial in Japan, where the witnesses of defendant were available were denied (R. 36, Tr. of June 27, 1947).

Motions to dismiss the indictment because Kawakita had not been lawfully arrested on probable cause, and because the facts alleged in the indictment could not and did not constitute treason in the setting where alleged and that jurisdiction was lacking (R. 36-38), were argued and denied by the trial court. A demand was made for the inspection of the grand jury minutes to determine if there were facts set out in those minutes. Up to the time that Kawakita was brought before the United States Commissioner, on June 5, 1947, he had not been told or questioned by anybody in the world regarding any alleged charge of treason (R. 4274).

The defendant demanded the right to inspect the minutes of the Grand Jury to see if any competent testimony had been presented before them on which to base an indictment —that is to say, whether there had been a single competent witness before the Grand Jury to any alleged overt act of treason. The motion to interrogate the foreman of the jury with questions propounded of the foreman of the jury, were not permitted and objections thereto by the government were sustained by the trial court (R. 39 *et seq.*).

When a second and superseding indictment returned adding overt acts L, M, N, and O to the indictment, the motions were renewed and efforts were again made to determine if there was any competent evidence before the Grand Jury, or whether the same evidence was considered in returning the superseding indictment, and these efforts were also blocked by the trial court, and motions to dismiss were denied.

All argument theretofore made, on the first indictment, were incorporated by reference and considered by the trial court on the motions to dismiss the superseding indictment.

The trial commenced on June 18, 1948. Twelve jurors and two alternates were selected. Objections were made to having two alternate jurors present, as in violation of the Constitutional right of trial by jury as that term is understood in the Seventh Amendment to the Constitution of the United States, and to have such alternate jurors present at all times with the twelve regular jurors. The challenge to the alternate jurors and the motion to discharge them was denied by the trial court.

Thereafter commenced a parade of ex-war veterans, many of whom had suffered deeply from their war experiences, and secured shock treatment in hospitals after the war and had been treated for war psychosis. Some of these men are still in the service, and all of them received promotions after their war experiences; they depicted their conditions of labor and alleged punishments received by them from time to time. In each instance the punishment was for an alleged infraction of the rules of the camp or the failure to perform work required in the mine, or in other disciplinary matters, or for actual acts and crimes against the laws of Japan and regulations for the government of prisoners of war in P. O. W. camps established pursuant to treaties between the United States and Japan (Exs. CS., CT. to CW., R. 227-238, 205-8).

Thereafter the trial continued to September 2, 1948.

The government conceded that Kakakita was at all times covered by the indictment a citizen of Japan, residing in Japan and drafted to work by the government of Japan in Oyama, Japan.

By reason of the Nationality Act of 1940, Subd. a, b, c, d, Section 402 (U. S. C. Section 802) he was presumptively—that is, presumptively a *non-citizen*, of the United States, or actually expatriated.

Not a single specific act showing intent to betray was presented; only isolated statements of expressions, discon-

nected with any overt acts, and designed to influence passions and prejudices, were permitted to be introduced into evidence.

After retiring to deliberate, the jury pondered four days in the summer heat, then requested to be discharged. The court sent them out for further deliberation and declined a defense motion to discharge them. The foreman of the jury became ill with nervous exhaustion and a doctor had to be called. The defense was not informed of that fact. Six days of deliberation produced a request from four of the jurors for discharge. The foreman pleaded to be discharged; all to no avail. Jurors stated that they had considered every phase of the case and were unable to agree. Again the court refused to dismiss them. The foreman of the jury twice asked for dismissal. Juror Clancy said "everything" had crept into the jury room and it was evident that feeling ran high. The foreman did not wish to sit with other jurors in the bus, for fear of hitting one of them. The judge ordered the jurors to return to the jury room. Mrs. Zeigler, a juror, said she did not feel like returning, but was compelled to do so. The judge, over objections, gave new and further instructions, telling them it was their *duty* to agree and that the minority should listen to the majority (R. 5629-30).

The jurors separated some of the time while not in the deliberating room. Doctors were called to attend the jurors during deliberation—without knowledge or notice to the defendant or his counsel.

Two and a half more days in a hot and ill-ventilated jury room produced a verdict as to some of the overt acts. Others were not withdrawn, but were not decided.

The judge declined to poll the jurors as to which two witnesses they thought established the overt acts and declined to send them back to decide the undecided overt acts and the government did not withdraw them.

The trial judge imposed the extreme sentence of death to the defendant for the eight overt acts—five of them for allegedly assisting the military in summary punishments—two for burglary, and thefts in the camp, and destruction of Japanese government property, another for being made to carry two buckets of paint instead of one, two others because they were disciplined to run around a compound a few extra times, and another who was injured and not moved back to the camp for a few hours when no transportation was shown to be available.

All motions for a judgment of acquittal and for a new trial were denied.

Specification of Errors

I

The evidence is insufficient to support the verdict: The verdict is contrary to the law and the evidence.

(a) The evidence is insufficient to establish any "aid and comfort" to the enemy as defined by the Constitution of the United States and in *Cramer* v. *United States*, 325 U. S. 1.

(b) Under International Law the prisoner of war camp was set up pursuant to treaty between Japan and the United States and all acts occurring therein were purely local. Such "aid and comfort" is authorized by International Law. Treason was not committed in the prisoner of war camp, even as a matter of law or fact.

(c) None of the overt acts in their setting showed any treasonable intent and *treasonable project*, nor was there any proof of such a *treasonable project* nor any act in furtherance of such project. The evidence was entirely insufficient to prove any *intent to betray*.

(d) There was a failure to comply with the two witness rule set up by the Constitution of the United States.

(e) The defendant was not a person then owing allegiance to the United States. If a dual citizen, he owed 100%

allegiance to Japan. If expatriated by his own voluntary acts, he owed allegiance only to Japan. The defendant was either actually or presumptively expatriated, and therefore not a subject of a prosecution for treason.

(f) There was insufficient proof that venue existed at Los Angeles, California and that the trial court in California had jurisdiction, and that the defendant was denied a speedy trial in Japan. The defendant was *found* in Japan, within the meaning of Title 28, Section 102, reported to the Consulate and Eighth Army in Japan and the court therefore had no jurisdiction.

II

At the time here involved, Petitioner did not owe allegiance to the United States.

A. To hold otherwise would be to make as naught the right of expatriation which the law of this land holds as fundamental.

B. At the time involved petitioner was not a citizen of the United States.

(1) Petitioner expatriated himself under 8 U. S. C. 801(a) by obtaining naturalization in Japan in March, 1943;

(2) Petitioner expatriated himself under 8 U. S. C. 801(b) by taking an oath or making an affirmation or other form of declaration of allegiance to Japan;

(3) Petitioner expatriated himself under 8 U. S. C. 801(c) by serving in the armed forces of Japan, he having the nationality of that foreign state;

(4) Petitioner expatriated himself under 8 U. S. C. 801(d) by accepting and performing the duties of employment under the government of Japan for which only Nationals of Japan were eligible.

(5) The presumption of 8 U. S. C. 802 applies;

(6) Petitioner's entire course of conduct in Japan was inconsistent with American citizenship.

C. Even if a citizen of the United States, petitioner at the time here involved did not owe allegiance to the United States.

D. If Kawakita did not expatriate himself from United States citizenship, and despite his actions to the contrary remained a citizen to both countries, he being a Japanese citizen residing in Japan owed total allegiance to the Government of Japan at the time of the acts here involved and therefore could not be guilty of treason.

E. Kawakita was presumptively expatriated and it was so construed by the American consulate before he left Japan. As such he was presumptively a non-citizen. One who is *presumed* innocent is innocent during the period covered by the presumption.

III

The Courts below have misinterpreted the law.

The jury was erroneously instructed as to the law that the Nationality Act of 1940 expresses the sole grounds by which an American citizen may lose his American Nationality and that Section 801 of Title 8 expresses the exclusive means of losing American nationality.

IV

The Court erred in its construction of the effect of Kawakita's obtaining the Japanese passport to go to China. Such obtaining of a passport from Japan constituted an act of expatriation. In any event, it showed he was under the protection of the Japanese government and not the government of the United States.

V

The Court erred in its instructions to the jury on the essential elements of the case.

VI

The Court erred in refusing the defendant's proposed instructions on the defendant's theories of the case.

VII

The Court erred in instructing the jury under the instruction of the Allen case after it had been deliberating six days and had announced that it was hopelessly disagreed, and twice requested that it be discharged.

VIII

The Court erred in the exclusion of the deposition of the Mayor of Suzuka City.

IX

The verdict was illegally obtained by coercion of the jury, which was locked up and kept out nine days without any knowledge of when it might be free, under a compulsion and mandate that it was their duty to agree, and that the minority should listen to the majority. The verdicts and the judgment are therefore null and void and a violation of due process of law guaranteed by the Fifth Amendment to the Constitution of the United States.

(a) The jury should have been discharged after it twice requested to be discharged and stated that it was hopelessly disagreed.

(b) The jury illegally separated while deliberating.

(c) During the deliberation, the jurors were treated for illness and the presence of an outsider, without the knowledge or consent of defense counsel or defendant. Such procedure denied the defendant a fair trial, and the right of the presence of the accused and to be informed of everything going on at every stage of the case.

X

The Trial Court erred in several procedural matters in the trial.

(a) After the return of the jury, the defendant was entitled to poll the jury as to the names of the two witnesses

whom the jurors believed established the constitutional requirement. This the defendant was denied.

(b) The return of the jury without an unanimous verdict on the whole of the indictment as alleged was unlawful.

(c) Discharge of the jury without the consent of the defendant, and over his objection, before a unanimous verdict had been reached on each of the issues was in fact an acquittal.

(d) The trial court erred in denying the defendant the right to inspect the Minutes of the Grand Jury and the right to question the Foreman of the Grand Jury regarding the basis for the return of the indictment, since the complaint against the defendant was founded purely on information and belief and the defendant had a right to know whether there was any competent evidence or any witnesses before the Grand Jury returning the indictment.

(e) The trial court erred in permitting fourteen jurors to sit throughout the trial of the case.

XI

The Court, in considering punishment, acted arbitrarily and capriciously and was influenced by matters of which there was absolutely no evidence and which were argued previously. The sentence, therefore, was arbitrary and illegal.

ARGUMENT

I

The evidence is insufficient to support the verdict. The verdict is contrary to the law and the evidence.

A

The evidence is entirely insufficient to establish any "aid and comfort" to the enemy.

The jury found the defendant guilty of eight overt acts. Overt Act (a) was the Toland incident, alleged to have

occurred on a date in May 1945, which date was unknown, and Toland had momentarily stopped working and it was alleged that he was struck to compel him to "greater" exertion (R. Tr. 1642).

Overt Act (b) alleged assistance of the military Sgts. Akamatsu and Ichiba, in punishing Grant for stealing Red Cross supplies from a Red Cross storehouse (R. Tr. 1915, *et seq.*), at which time the Japanese Military Officers Akamatsu and Ichiba, Gunso knocked him into a cesspool (R. Tr. 1917, 1918). He did not identify the defendant as one of those who participated in his punishment for theft.

Overt Act (c) consisted of the punishment of the men by each other for destruction of Japanese Government blankets (R. Tr. 731, *et seq.*). The men were lined up by Sgt. Ichiba (R. Tr. 748, 749). The men were told to punish each other for misuse of Japanese government property. Johnie T. Carter testified that the defendant struck him across the back and head because he was not hitting the man in front of him hard enough (R. Tr. 1938). Wilburn Van Buskirk testified that an Englishman was told to go down and slap everybody and the defendant told him to do it, and the defendant hit a man and knocked him down (R. Tr. 2540). Meiji Fujisawa (R. Tr. 3641) testified that he saw the incident. He could not remember who was present and did not remember the defendant being present. The defendant denied that he had anything to do with the punishment (R. Tr. 4107).

Overt Act (d) constituted summary punishment of Thomas John O'Connor (R. Tr. 2100) for stealing, after three other prisoners of war had revealed that O'Connor had broken into the warehouse. Japanese Sgt. Akamatsu hit him and knocked him into the pool and the defendant struck him the third time (R. Tr. 2105, 2106).

Overt Act (g) constituted making David R. Carrier and George W. Simpson run around the compound some (four)

extra laps after the men had quit work, presumably too early. The orders to run around were made by the Japanese Sergeant (R. Tr. 369, *et seq.*; testimony of David R. Carrier, R. Tr. 2246; testimony of George W. Simpson). They had made about two laps when the defendant walked out and told them to catch up with the rest of the men and threw some clods.

Overt Act (i) consisted of alleged failure to get Johnie T. Carter (R. Tr. 1847) back to the camp after he had fallen and landed on a rail and was injured, which allegedly occurred about 2:00 o'clock in the afternoon. Carter was taken into the camp with the rest of the detail and had to ride in an open car on the train and did not arrive at the camp until about 6:00 o'clock.

Overt Act (j) was the Armellino paint bucket incident. Armellino was in the can-carrying detail and at the time was carrying one can of paint. The defendant stopped him him and asked him why he wasn't carrying two cans, which was the required quota for each prisoner of war to carry. Armellino replied that he was too weak. The defendant then took another can from another man and placed it in Armellino's arms. Armellino did not carry it much longer (R. Tr. 1218 to 1234 inclusive).

Overt Act (k) was the Woodrow T. Shaffer act of punishment occurring allegedly in the early part of August 1945 (R. Tr. 2057), when a Japanese guard caught a prisoner of war cooking some beans that had not been issued in the general mess. There were very strict regulations against stealing vegetables from the garden. Shaffer admitted stealing the beans. He said the defendant told him to get upon a little stand, and the defendant and Akamatsu placed a piece of bamboo under his knees and another under the high part of his instep, and made him kneel on it; and the defendant placed a bucket of water on his head and

told him to hold it above his head without bending his elbows. The defendant and the Japanese guards kept the bucket filled. He was also told to hold up a log. He later fell off a platform and something hit him on the head.

We have set forth in the appendix a detailed summary of each of the testimony of all of the witness to each alleged overt act.

Thus, it will be seen that:

(1) Two of the overt acts required work from prisoners of war who were not either doing the quantity of work required of him or doing nothing at all at the time. In Overt Act (a), Toland was momentarily not doing anything; Overt Act (j) Armellino was only carrying one bucket of paint when he should have been carrying two paint buckets, and he was given the required quota to carry according to the government evidence. A third overt act, to-wit, (i) was in failing to get John T. Carter back to camp for medical treatment for about 4 hours after injury.

(2) All of the other acts were summary punishments inflicted by the military officers in charge of the camp, allegedly for violation of laws of Japan against theft or the rules and regulations of the prisoners of war camps.

Looking at the whole case charged against the defendant, we respectfully submit that there was no "aid and comfort" to the enemy in respect to any of the acts charged. To be of aid and comfort there must be a *treasonable project.* Here there was none.

In *Cramer* v. *United States*, 325 U. S. 1, at page 35, this court said:

> "When we deal with acts that are trivial and commonplace and hence are doubtful as to whether they give aid and comfort to the enemy, we are most put to it to find in other evidence a treacherous intent."

The court further said:

> "The very minimum function that an overt act must perform in a treason prosecution is that it show sufficient action by the accused, in its setting, to sustain a finding that the accused actually gave aid and comfort to the enemy."

And, this court set out as its definition of "aid and comfort" as follows:

> "'Aid and comfort' was defined by Lord Reading in the Casement trial comprehensively, as it should be, and yet probably with as much precision as the nature of the matter will permit: '. . . an act which strengthens or tends to strengthen the enemies of the King in the conduct of a war against the King, that is in law the giving of aid and comfort' and 'an act which weakens or tends to weaken the power of the King and of the country . . . is . . . giving of aid and comfort.'"
>
> (*Cramer* v. *United States*, 325 U. S. 1, pp. 28, 29).

In *Haupt* v. *United States*, 91 L. Ed. at page 1150, 330 U. S. 633, Mr. Justice Jackson speaking for the Court said in speaking of the *Cramer* case:

> "It was reversed because the Court found that the act which two witnesses saw could not on their testimony be said to have given assistance or comfort to anyone, whether it was done treacherously or not. To make a sufficient overt act, the Court thought it would have been necessary to assume that the meeting or talk was of assistance to the enemy, or to rely on other than two-witness proof. . . . We pointed out that Cramer furnished no shelter, sustenance or supplies. 325 U. S. 1, 37, 89 L. ed., 1441, 1462."

Speaking of *Haupt*, the court said:

> "In the light of his mission and his instructions, they were more than casually useful; they were aid and steps essential to his design for treason."

In the Kawakita case, the acts charged here and testified to by the various prisoners of war witnesses could not have given assistance or comfort to anyone. Certainly, making Toland work when he had momentarily stopped working; making Armellino carry two buckets of paint when he was only carrying one, could not have given aid or comfort to the government of Japan. If Carter was disabled by reason of an injury, the failure to get him back to the camp for medical treatment immediately might keep Carter disabled from work a longer period of time than otherwise and result in one less working prisoner of war. This would give less aid to the enemy, and certainly no comfort, as it would not enable the prisoner of war to return to work quickly. Nor, could the other acts of punishment which the Japanese military inflicted themselves, and in which the defendant allegedly participated, be of any aid and comfort to the enemy in helping them to win the war or us to lose it.

In *Ex Parte Bollman*, 4 Cranch 75, at 125, 127, this Court said:

> "The crime of treason should not be extended by construction to doubtful cases."

Treason is the betrayal of one's country, not the making of one work who is required to work and not doing it, or doing only the quota that he is required to do in a prisoner of war camp to eat, or carrying an extra bucket of paint and getting punished summarily for theft or cutting up government property, or otherwise disobeying internal rules in a prisoner of war camp. The very statement of the case seems to be a complete answer to the charge of "treason."

The eight overt acts over a period of a year found by the jury were trivial; they furnished no shelter, sustenance or supplies to the enemy; they did not constitute disclosure of military secrets; they took place in a prisoner of war

camp where the men were merely a discharge labor battalion and contrary to the allegations of the indictment the men were actually under the complete domination and control of the Japanese Military authorities. The place was run like a prison with guards guarding the prisoners of war, and it was run as a complete military operation, and the defendant, a subordinate employee, was subject to its orders and punishments.

As stated by Chief Justice Marshall in Ex Parte Bollman, 4 Cranch 75, 8 L. Ed. 554:

> "To prevent the possibility of those calamities which result from the extension of treason to offenses of minor importance, that great fundamental law which defines and limits the various departments of our government has given a rule on the subject both to the legislature and to the courts of America, which neither can be permitted to transcend. . . . It is, therefore, more safe as well as more consonant to the principles of our constitution, that the crime of treason should not be extended by construction to doubtful cases; and that crimes not clearly within the constitutional definition, should receive such punishment as the legislature in its wisdom may provide."

In *United States* v. *Stephan*, 50 Fed. Supp. 738, 743, approved in *Stephan* v. *United States*, 133 F. (d) 87, Cert. denied 319 U. S. 781 the court said:

> "Our forefathers did not want Congress to be able to take spitting in somebody's face or anything of that kind, as being treason so they tell the congress itself what it is."

Nowhere can we find the acts set out in this case ever to to have heretofore been held to be "treason."

B

The setting of all of the alleged acts was in a prisoner of war camp and mine operated in Japan.

The prisoners of war were there by International Law, a part of the Supreme Law of the Land (Article I, Section 8, Constitution of the United States; Ex Parte Quirin, 317 U. S. 1), and all of the prisoners were subject to the laws of Japan regarding thefts and other crimes and the rules and regulations of prisoners of war camps in Japan, pursuant to International Law and International Treaties (Government's Exhibit CU).

In 1942, the United States and Japan exchanged treaties by which they agreed through the Swiss Government, acting as an intermediary, to abide by the rules of the Hague Convention regarding prisoners of war. These are binding commitments, and under it the Japanese Government therefore had complete control of the labor battalion which constituted the prisoners of war at Camp Oeyama. (See Exhibit CU, CW, as set forth in the letters in our Appendix to our brief, and the others are all in the Exhibits before this court.)

"Aid and comfort" such as working for the enemy to live is thus authorized by International law in prisoner of war camps. Otherwise every prisoner of war would be guilty of treason.

Therefore, the alleged acts and transactions in the prisoner of war camp at Oeyama, which was then in Japan, a sovereign Nation, could not in this setting constitute treason as a matter of law, or fact.

The prisoners of war were all labor battalions. They were within the power and control of the conquering government, and the men there were all disarmed laborers, receiving the privileges of prisoners of war by a then apparently conquering nation. They were in effect legal

slaves permitted to be such under International Law and the laws of war but required to obey the enemy's orders and laws, by reason of our own treaty. They were allowed to work for the enemy, receive pay from him and to eat and live by reason of International Law and International Treaties. They are impotent as warriors. In this setting the acts complained of could not be treason.

In re Territo, 156 Fed. (2d) 142;
Cramer v. *United States*, 325 U. S. 1;
Chandler v. *United States*, 171 Fed. (2d) 921.

Also see "Prisoners of War," a study and development of International Law by William E. F. Flourny, a copy of which has been filed by the Appellant's counsel with the Clerk of the Supreme Court.

It may be remarked that even in the two instances, which were the only instances that involved compulsion of men to work, to-wit., Overt act (a) the Toland incident and Overt act. (j) the Armellino paint bucket incident, that neither man was required to do more than his quota or requirement under International Law. Therefore it was the duty, even of Americans to compel obedience to the requirements under our treaty obligations. Our international contract with Japan was a part of *our* law. Disobedience of the laws of Japan, theft and destruction of Japanese property, was therefore punishable under Japanese law by reason of our international agreement with Japan.

The Supreme Law of the United States embraces the Law of Nations; International Law and Treaties; Law of the Fighting Nations and Local Rules and Regulations of those nations in time of war; Article I, Section 8 of the Constitution of the United States; Article I, Section 7, Clause 3 of the Constitution of the United States; Article Four, Section 2, Clause 3, of the Constitution of the United States; Ex Parte Quirin, 317 U. S. 1, 87 L. Ed. 3; Treaty

of the Hague (Treaty Series 539, (Exhibit CR) in evidence); Treaty Series 846 and Treaty Series 539 and Rules and Regulations for the Government of Japanese Prisoners of War Camps, Defendant's Exhibit CS in evidence.

In re *Yamashita*, 327 U. S. 1, 72, provisions of the Treaties between the United States and Japan were declared to be in force. The prisoners of war camps were, therefore, by International Law under the complete policy and dominion and control of Japan, pursuant to the Treaty of the Hague. The provisions of the Treaty obligations between the United States and Japan were self-executing and are last in point of time. (See *Rosborough* v. *Rossell*, 150 Fed. (2d) 809, 812, 813; *United States* v. *Reid*, 73 Fed. (2d) 153.)

Pursuant to the treaty it is provided "prisoners of war shall be subject to the laws, regulations and orders enforced in the army of the state in whose hands they have fallen" (Exhibit CT).

Everyone within the prisoner of war camp were within the control of Japanese Army and all persons there were under the Japanese Military authority, then itself a Sovereign nation, and required to obey its laws, rules, regulations and commands.

Hague Conventions of 1899, 1907 and the Geneva Convention of 1929; the Constitution of the United States Article I, Section 8; Hague Convention 1899; 2 Malloy U. S. Treaties and Conventions, pp. 2042, 2049; Hague Convention 1907; 2 Malloy, pp. 2259, 2282; Geneva Convention of 1929, 4 Malloy, pp. 5224, 5237; U. S. List of treaties in force December 31, 1941, p. 39 [See Defendant's Exhibits CU and CS]; Oppenheim's International Law Sixth Edition; Winthrop's Second Edition, Volume 2, point 2, Section 1228; Flourny, Prisoners of War; Hall International Law, pages 490, 497; Hyde's International Law, Section 675. Treaties are in evidence as Defendants Exhibits CU and CW.

See also Reporter's Transcript 3910-3985.

The work of prisoners of war is permissible "aid and comfort" without being treason.

Since prisoners of war may volunteer for work for a variety of purposes designed directly to aid the captor in the prosecution of the war, enabling it to release potential fighters from non-military tasks of which the proper performance might be, nevertheless, a military necessity, such acts do not constitute treason or a setting for treason. As it is authorized by International Law the work therein is not a "treasonable project."

3 Hyde: International Law, p. 1851;
War Department: Rules of Land Warfare, Sections 100-104;
Geneva Convention of 1929, Art. 27.

Kawakita was himself drafted for the job; he received his draft papers on August 15th, 1944, during his absence in China on a Japanese passport, and when he returned he was drafted to work in this job and could not leave it or fail to work without being severely penalized (Exhibits AB, and AB1, and Z). He was like a soldier, subject to the orders of the Japanese government. On his arrival at the camp, he was ordered to report to Lt. Hazama (R. Tr. 4056). Lt. Hazama told the defendant that he was to take orders from the military and that the place where the prisoners of war were working was a Military Zone. He was told to act in a stern, military manner. In case there were any orders from the Japanese military he was to interpret them (R. 4056). He was told by Lt. Hazama, the top man at the camp and director of all military personnel (R. 3789) if he disobeyed the military he would be severely punished and even might be killed by the authorities. This is the general military rule regarding prisoners of war camp and our own army regulations provide for military courts martial and supervision of those attached to the army—whether in uniform as such or not.

Kawakita was entirely within the control of the Japanese Government, then a Sovereign Nation. For any violations he was subject to punishment by Japan. If he had been in Japanese uniform and drafted as such by the government and did the acts here charged, he might be subject to local military punishment, but not to punishment under International Law for the crime of Treason. And, even if he committed any improper acts of a local nature, it was up to Japan—a then Sovereign Nation to punish him.

The defendant has throughout the trial denied all of the acts charged. We reiterate that denial. The denial was supported by substantial documentary proof that from March 1st, 1945 until the close of the war he was working in the electrical factory as a clerk and not an interpreter and was employed from 8:00 o'clock in the morning in that capacity until five o'clock in the afternoon, whereas all of the acts charged were supposedly at an earlier or different time and elsewhere.

Nevertheless, we have argued the case on the evidence favorable to the government on the eight overt acts.

We most strongly contend that in the setting of the prisoner of war camp here Kawakita was not and could not be guilty of treason. As said in *Haupt* v. *United States*, 330 U. S. at 634:

> "We have held that the minimum function of the overt act in a treason prosecution is that it shows action by the accused which really was aid and comfort to the enemy."

We respectfully submit that in the setting here, in the prisoner of war camp, there was not and could not be any "aid and comfort" to the enemy by an interpreter drafted to his job and working in the camp under local laws, rules and regulations. An excess of zeal, or efficiency if it occurred did not conver otherwise non-treasonable acts into treasonable ones.

It must be remembered that the prisoners of war were problems of discipline, and that even the prisoners of war themselves set up a kangaroo court—a prisoner of war court of their own to take off the heat from Japanese punishment, and it must also be remembered that American Sgt. Montgomery admitted himself that he administered beatings to prisoners of war for thefts which they committed (R. 248).

The Japanese punished their own people by striking or beating them (R. 4026, 4029).

General Patton slapped an American soldier in Italy without being punished for Treason—in fact without being punished. The mistreatment of American prisoners by Americans in Camp Litchfield, England is well known.

It must be remembered, also, that in connection with the five punishment acts of the prisoners of war that each of the Americans could have been severely punished and even given the death penalty for their acts under the local laws rules, and regulations, authorized to be adopted by International law.

None of these were inflicted. If Toland and Armellino were persuaded by kindly entreaties to work, or carry two buckets of paint, would such "persuasion" constitute treason? The manner of "persuasion" does not make out a case of treason.

C

There was no proof of any specific intent to betray the United States, which is the first essential element of treason.

Cramer v. *United States*, 325 U. S. 1, 89 L. Ed. 1441; *Haupt* v. *United States*, 330 U. S. 631.

As said in *Cramer* v. *United States*, 325 U. S. 1:

"Treason requires betrayal of one's country into the hands of the enemy."

The case also points up the fact that "treasonable intent" is a separate element requiring proof in addition to proof of "aid and comfort."

Certainly one cannot be convicted of Treason without having performed an act that is traitorous. It must be such an act as, when coupled with evidence of the accused owing allegiance to the United States, and a *traitorous intent* would warrant submission of the case to the Jury.

Cramer v. *United States*, 325 U. S. 1.

Such a traitorous intent requires a *treasonable project*, entirely lacking here. (*Haupt* v. *U. S.*, 330 U. S. 631.)

We respectfully submit that none of the alleged overt acts nor the statements relied on to show intent survive this simple test.

There is no proof in any of the acts of a specific intent to betray the United States, the first essential element of Treason. None of the acts were a *design* for treason. It was not contended by the government that the acts in and of themselves established treason, for none of them amounted to the dignity of the high crime of Treason. To establish a treasonable intent, the government attempted to prove such treasonable intent from other statements and other conduct of the defendant. These were unrelated to the overt acts.

In the Appendix,[13] we have summarized the evidence of the various witnesses which the government offered as evidence of "treasonable intent." The first of them is a purported criticism of General MacArthur (R. Tr. 365). In this respect he now has company in the President of the United States. Other alleged comments were regarding work, and whether the men were physically capable of working or not (R. Tr. 600, 651, 724). Other comments were that

[13] The Appendix has been furnished in separate volumes of the opening brief in the Court of Appeals, copies of which have been lodged with the clerk of the court and not reprinted here.

Japan might win the war and Japanese soldiers were better than American soldiers (R. Tr. 1509).

We have placed a summary of the evidence as to "treasonable intent" in the Appendix. We submit that none of it actually shows treasonable intent within the meaning of the definition by the Constitution.

In order to measure up to the standard of intent to betray we submit that the intent to betray to constitute treason must be an intent to deliver your own government into the hands of the enemy government—not to spit into somebody's face or make some adverse comment about a prominent general (the defendant now has company in the President of the U. S. regarding MacArthur) or even boast of the country that was then winning the war, and which occurs with a disarmed labor battalion, impotent in its capacity to do anything but work in order to eat and live.

As said in *Foster Crown* cases, page 792, Chapter 3, Sec. 8, page 216, "what constitutes treasonous acts has been many times stated as "by surrendering a castle of the King for reward, or selling the enemy guns, or assisting the King's enemies, furnishing rebels or enemies with money, arms, ammunition or other necessities, will prima facie make a man a traitor."

And as said in *Cramer* v. *United States*, 325 U. S. 1, at page 34.

> "When we deal with acts that are trivial and commonplace, and hence are doubtful as to whether they gave aid and comfort to the enemy, we are most put to it to find in other evidence a treacherous intent."

We submit that the evidence in this case does not prove any such treacherous intent.

It is well established that the overt act and the intent are separate and distinct elements of the crime of treason under

the constitution and that each must be fully established beyond a reasonable doubt.

Cramer v. *United States*, 325 U. S. 1, at p. 54, and see *cases therein cited.*

In *Cramer* v. *United States*, 325 U. S. 1 it is stated:

> "But to make treason, the defendant not only must intend the act but he *must intend to betray his country* by means of the acts."

In this case such proof is entirely lacking.

Further Insufficiency of the Evidence of Intent to Betray

Paragraph (5) of the indictment charges that the defendant Tomoya Kawakita did the acts "unlawfully, feloniously, traitorously, and treasonably, *and with treasonable intent to* adhere to and give aid and comfort to said enemies."

What Is "Intent to Betray?"

Judas Iscariot betrayed Christ for thirty pieces of silver. Brutus betrayed Julius Caesar; Benedict Arnold betrayed the Colonial Armies to the British. Giving money, food or military intelligence to the enemy have shown intent to betray, and broadcasting propaganda for the enemy by the American citizens for the purpose of weakening his own country and insuring the enemy of success has been held in more recent cases to evidence an intent to betray. (See *Chandler* v. *United States*, 171 F. 2d 685.)

But, none of the acts charged in this case, borrowing an expression from the law of negligence, show in and of themselves any *proximate cause* or *relationship* with any intent to betray. The testimony relates to conversations and alleged acts which are isolated, disconnected and inflammatory. There must be a *treasonable project* and the

accused must have committed the overt acts with the knowledge or understanding of its treasonable character.

Cramer v. *United States*, 325 U. S. 35, also 60.

The prosecution cannot rely on evidence which does not meet the constitutional test of intent to betray to create an inference that the accused did other acts, or did something more than was shown in the overt acts, to constitute *betrayal.*

In *Cramer* v. *United States*, 325 U. S. 1 at page 35, the court said:

> "It may be that in some cases the overt acts, sufficient to prove giving of aid and comfort, will fall short of showing intent to betray and that questions will then be raised as to permissible methods of proof that we do not reach in this case. But in this and some cases we have cited where the sufficiency of the overt acts has been challenged because they were colorless as to intent, we are persuaded the reason intent was left in question was that the acts were really indecisive as to giving of aid and comfort. When we deal with acts that are *trivial* and *commonplace* and hence are doubtful as to whether they gave aid and comfort to the enemy, *we are most put to* it to find in other evidence a treacherous intent."

In examining all the other evidence, we confidently assert that there is no evidence therein of any treacherous intent.

Treasonable intent must be a specific intent to betray the United States of America. There is no such proof in this entire record. During the long deliberation of the jurors—on the sixth day—one of the jurors asked the trial judge to define the word "betray." The court gave the jury a haphazard definition which he himself designated as unsatisfactory. The defense counsel thereupon offered a dictionary definition of the word "betray." The court declined to give it (Clk. Tr. p. 284). This showed that the jury itself was floundering with the question of "treasonable intent."

In *Haupt* v. *United States*, 300 U. S. at page 645, Mr. Justice Douglas said:

> "As the Cramer case makes plain, the overt act and the intent with which it is done are separate and distinct elements of the crime.
>
> "For proof of treasonable intent in the doing of the overt act necessarily involves proof that the accused committed the overt act with the knowledge or understanding of its treasonable character."

The record in this case is not only silent as to any proof of any treasonable intent, the record is affirmatively a complete showing that the accused had no knowledge or understanding of any treasonable character of any act allegedly committed by him.

As we examine the overt acts in their setting, we can well understand why they lack such a character. Men confined in the camp were not soldiers any longer in any practical sense, they were prisoners of war and as Sergeant Montgomery said, "a labor battalion." International law was local law and rules and regulations adopted in the form of mutual treaties between the two countries made these prisoners of war nothing more than prisoners in an actual sense as well as in a military sense. They were placed in a confined area; military or prison guards were placed over them; they were required to obey these prison rules and regulations; they were required to salute the guards; they arose and obeyed in military fashion all of the commands of their superiors, the country which held them within its power under the terms of the Hague treaty.

The overt acts, and each of them, in this setting showed no character of "treasonable" intent. In this setting there could be no *treasonable project.*

Phillip Toland, overt act A, by his own admission was not working, for about three minutes he had stood without doing any work. He had been approved by the doctor for

work as was customary to approve all persons before they were sent out to work which approval was by the American doctor. He made no complaint of his failure to be able to work, nor did he ask to be relieved from it. The alleged act of kicking him which had occurred, therefore, was not of a character that bore any relationship to any treasonable intent such as we have always understood, in intent to betray such as sending information or intelligence to the enemy.

As Justice Douglas said:

> "The requirement of an overt act is to make certain a *treasonable project* as moved from the realm of thought into the realm of action. *Haupt* v. *United States*, 330 U. S. 645."

That requirement has not been met in the present case. There was no *trrasonable project* either in thought or action in this overt act, or any other.

(b) The second overt act was punishment of Grant for burglary and theft. This showed no "treasonable" intent. It certainly was in no way related to a treasonable project. Grant was admittedly a thief, stealing from the Red Cross and thus depriving other Americans of what they would logically be entitled to receive.

(c) The next incident was the Carter incident, where Carter fell and hurt himself while on a log carrying detail. It happened in the afternoon, and it was said that Kawakita did not permit Carter to be taken forthwith back to the camp for medical treatment. He was taken back at 5:00 o'clock in the afternoon on the usual train which took prisoners of war back to the camp. While there is a wide difference in the evidence regarding what actually happened, the Government failed to prove that there was any train available to take him back, or that he could not be taken to the Mining Hospital, which was located nearby, or that, as a matter of fact, it was proper to move a person

who might have had a bone injury until there were proper facilities for moving him.

In any event, there was certainly nothing treasonable to the United States in the character of this act, if it occurred; and the matter of the delay of a few hours in his transportation, if it occurred, could not convert this alleged failure to act into an act of treason.

Every day we have on our streets people who are injured in automobile accidents and have them lie there for a long time before police ambulances arrive. Policemen stop other people from picking them up, or transferring them until they have the proper facilities and the properly equipped person to move them. No medical or expert testimony was offered to show that Carter was not handled exactly right even from a medical standpoint. Certainly lay men were not qualified.

There certainly was nothing treasonable in the character of this alleged overt act, and nothing which showed any treasonable intent or project. It could not help Japan to have a prisoner of war disabled so that he could not return to work immediately.

(d) Nor could treason be garnered from having a man carry two buckets of paint, the quota he was required to carry. There was certainly nothing treasonable in this act.

The other five alleged overt acts were allegedly assisting the military authorities in carrying out the punishments for admitted thefts and crimes, destruction of government property in the prisoner of war camp itself.

None of the punishments were ordered by Kawakita. At some of them he was not present at the outset and it is not denied that all of them were ordered by the military authorities, and carried out under their direction and command and ended under their direction and command.

The disciplining of prisoners of war in a foreign country within military zone territory at a time when the govern-

ment is an integrated power and acting within treaty obligations, certainly carries no treasonable intent, even if it may be objectionable and contrary to our own standards of punishment.

An examination of each of the acts will show that there was no treasonable intent in any of them.

* * * * * * * *

The Government Itself Did Not Contend, During the Trial, That the Acts Here Charged Showed Treasonable Intent, but They Relied on Independent and Different Evidence to Show Treason.

There was no proximate cause between the evidence of alleged "intent" and the overt act charged in the indictment. The disassociated evidence of alleged intent was likewise trivial and commonplace in its character.

Cramer v. *United States*, 325 U. S. 1.

We have set out the *intent evidence* in the appendix because of its length. None was proof of specific intent to betray the United States by means of any of the overt acts. To borrow an expression from the law of negligence there was no proximate causal relation between the two.

The words might lawfully have been uttered by a citizen of the United States.

Hartzell v. *United States*, 322 U. S. 680, 689.

To permit an intent to betray to be inferred from speech regarding a war and to convict for some later trivial act disconnected with the speech is to enlarge the crime of treason far beyond historical conceptions, and to make any war talk some evidence of treasonable intent is to stretch the law of treason beyond its prescribed constitutional and statutory limits.

Time after time the court admitted testimony regarding trivial matters, completely disconnected with any overt act, under the guise of showing "intent and state of mind."

None of these alleged incidents, as a matter of law, could arise to the level required to show a treasonable intent and state of mind. The only result was to inflame the minds of the jurors and prejudice them against the defendant.

Below are these incidents with references to the reporter's transcript where the offer was made for their admission on the ground referred to, the proper objection made, the court's ruling and the evidence received. A careful reading of these references will disclose that in most instances other Japanese were present and when taken into consideration along with the circumstances in this case the proper inference should be that the defendant was interpreting orders given by his superiors and not going to show his own intent or personal state of mind.

Testimony was received that the defendant thought it was dirty of General MacArthur to leave the men in the Philippines and that he was no good (see Rep. Tr. p. 365, lines 6-25). Also that "It looks like MacArthur took a run-out powder on you boys" (see Rep. Tr. p. 648, lines 1-6). And a statement that "Roosevelt was no good" (see Rep. Tr. p. 1981, line 3, to p. 1982, line 5).

Similarly witnesses were permitted to testify time after time to incidents where the defendant had urged the prisoners to get out more work with many instances where the Japanese hanchos were standing right along side of the defendant so that the only fair inference is that the orders came from the other Japanese and not from the defendant (see Rep. Tr. p. 600, lines 4-22; p. 964, lines 4-9; p. 965, lines 2-5; p. 1079, line 19, to p. 1080, line 11; p. 1158, lines 12-18; p. 1159, lines 3-10; p. 1211, lines 13-23; p. 1334, line 4, to p. 1336, line 7; p. 1402, lines 7-10; p. 1696, line 9, to p. 1699, line 4; p. 1779, line 8, to p. 1780, line 4, and p. 2432, line 1, to p. 2433 line 16).

Evidence was also received on the same grounds that the defendant had taken away the rations of certain men be-

cause they were too ill to work (see Rep. Tr. p. 651, line 11, to p. 654, line 17, and p. 2218, lines 5-21) or because they had not done sufficient work (see Rep. Tr. p. 1707, lines 5-12) and that the defendant had made a prisoner work even though the Japanese hancho had permitted the man to rest because of illness (Rep. Tr. p. 1893, line 10, to p. 1894, line 6).

Prejudicial evidence was received regarding alleged statements of the defendant as to his opinion of which race was superior. For example: "The Japanese were a little superior to your American Soldiers" (see Rep. Tr. p. 648, lines 1-6); and "* * * the Japanese were far superior to the American people and if the American army had Japanese officers, why they could whip the world" (see Rep. Tr. p. 1509, line 13 to p. 1510, line 17).

When one considers that the defendant was at the camp in the capacity of an interpreter the normal construction to put on his statements is that he was interpreting the orders of his superiors. However, the court admitted prejudicial testimony tending to show that the defendant was giving orders on his own initiative. In some instances the witness used the word "order" and considerable time was consumed getting the witness to whip his testimony into shape to get around an objection that it was his conclusion (for examples see Rep. Tr. p. 724, line 17, to p. 725, line 6; p. 726, line 21, to p. 727, line 4; p. 1280, line 8, to p. 1281, line 5; p. 1281, line 17, to p. 1282, line 9; p. 1502, line 9, to p. 1503, line 13; p. 1700, line 25, to p. 1701, line 5; p. 1703, line 13, to p. 1704, line 14; p. 2043, line 7, to p. 2045, line 23, and p. 2436, line 8, to p. 2437, line 8).

And alleged statements of the defendant as to how long the war would last and who would win were permitted in evidence as going to show intent and state of mind (see Rep. Tr. p. 791, lines 6-17; p. 881, line 19, to p. 882, line 1, and p. 962, line 13, to p. 963, line 3). The same is true of statements that the defendant intended to return to the United

States with several witnesses testifying that the defendant said he would be a "big shot" because he knew both languages (see Rep. Tr. p. 882, line 16, to p. 883, line 6; p. 1166, lines 14-22; p. 1705, line 23, to p. 1706, line 16; p. 1776, line 15, to p. 1777, line 17; p. 2046, line 16, to p. 2047, line 5, and p. 2159, line 19, to p. 2160, line 7).

Some of the evidence received to show intent and state of mind of the defendant to support a charge of treason, if it were not for the many instances of inflaming the minds of the jurors against the defendant, should be construed to show a disposition of the defendant to prevent the prisoners from receiving more severe punishment. For example a statement of the defendant that "I guess you fellows understand the circumstances. If you don't work, why, you will suffer" (see Rep. Tr. p. 1277, line 4, to p. 1278, line 11). The same is true of such statements as "Don't you know you are not allowed to have this kindling," "Don't you know it is against the camp rules and regulations?" (see Rep. Tr. p. 1160, lines 7-24). Also when the defendant was accused of taking some roasted nuts from the witness Bruce (Rep. Tr. p. 2758, line 23, to p. 2761, line 5) or a cigarette (Rep. Tr. p. 2764, line 24, to p. 2767, line 5) when they were supposed to be working.

Many of the alleged statements of the defendant could only have been offered to arouse the jurors' passion and prejudice against the defendant for there is no possible connection between any of the overt acts or even the general subject of treason. For instance calling Red Cross furnished corned beef "American garbage" (Rep. Tr. p. 1332, line 22, to p. 1333, line 11); or that the Japanese "couldn't waste any good medical aid on a bunch of lazy Americans" (Rep. Tr. p. 1336, lines 19-25); or that the United States Government "never gave me a damn thing" (Rep. Tr. p. 1374, line 12, to p. 1375, line 23); or the statement allegedly made on the day hostilities ceased that "you will be getting fat from now on" (Rep. Tr. p. 2221, lines 4-15). The same

is true of alleged statements that the defendant wished the Americans were all dead (Rep. Tr. p. 1641, line 21, to p. 1642, line 8; p. 1860, lines 3-17).

Probably the prize alleged situation offered by the government and admitted into evidence to show intent and state of mind was the testimony of the witness Carter that the defendant had made two of the boys thumb their nose at the United States. The witness testified to repeated trips by the defendant into the jimusho, or Japanese office, while this incident was going on as well as to the presence of other Japanese. Yet the prosecution offered and the court admitted this evidence as tending to show the personal intent and state of mind of the defendant. (See Rep. Tr. p. 1856, line 16, to p. 1859, line 1.)

Taking into consideration all of the circumstances in this case, the defendant contends that, as a matter of law, the above-mentioned evidence could not possibly go to show a treasonable intent and state of mind and was of such a prejudicial and passion arousing nature that the conviction must be set aside.

To Save Repetition Under the Heading of Errors of the Trial Court in the Admission of Evidence We Also Urge That the Admission of All of This Evidence Constantly Objected to in the Trial and Admitted Over Objections to Show "Intent" Was Prejudicially Erroneous.

It must be clear that dual citizens of the United States residing in an enemy state are not guilty of treason by reason of some acts of trafficking with the enemy which, in the case of other citizens, might warrant a conviction.

"(b) *Treason is not committed by the expression of ideas and opinions.*

'Mere words that are expressions of opinion, printed printed or written, will not constitute acts of treason' or 'intent' to betray."

Frohwerk v. United States, 249 U. S. 204, 209;
United States v. Werner, 247 Fed. 708, 710;
Wimmer v. United States, 264 Fed. 11;
Equi v. United States, 261 Fed. 53;
United States v. Herberger, 272 Fed. 278;
Chafee: *Free Speech in the United States*, pp. 259-260;
Hurst: *Treason in the United States*, 58 Harvard Law Review 430. (This is a complete historical summary of the law of treason.)

Defendant's State of Mind

The evidence regarding Kawakita's state of mind at that time did not meet the burden of proof required of the Government to show that Kawakita did *not in fact believe* that he was 100% Japanese during the times mentioned in the indictment or to show that he had any intent to betray the United States.

The uncontradicted proof was all to the contrary, since he was a citizen of Japan, and the court so instructed the jury under this state of facts.

The defendant believed that he was a citizen of Japan owing his entire allegiance to Japan as he had a right and duty to do. The very evidence cited above to show "intent" if it proves anything, it proves that the defendant regarded himself as totally Japanese. Therefore, even though it might be argued that he was a dual citizen and therefore also a citizen of the United States under the Fourteenth Amendment, the entire evidence in this case is uncontradicted that he was a citizen of Japan owing total allegiance to Japan, while in Japan and that he therefore had at no time any intent to "betray" the United States.[14]

[14] He had a right to rely on the statutes and regulations declaring that he was presumptively expatriated, or a non-citizen. The American consulate found he had overcome the *presumption* of expatriation, showing that during the time of the overt acts he was presumptively a non-citizen, in the view of the State Department. Its construction is entitled to great weight.

It was held in Pryor, Federal Case No. 16095, 2 Biff. 344 that the mere going ashore from an enemy vessel on which defendant was a prisoner, although with intent to procure provisions for the use of the enemy does not constitute treason.

Likewise, in *United States* v. *Fricke*, 259 Fed. 673, it was held that assistance to an alien enemy known to be such, intended only as aid to him as an individual, is not a treasonable project within the meaning of this section.

The constitutional definition of treason leaves no room for Congress to extend or limit the definition, and limits the power of Congress over such subjects to prescribing the punishment. (*United States* v. *Greathous*, Fed. Cas. No. 15254, 4 Sawyer 457, 2 A. BBUs 364.)

We cannot conceive under any of the facts of this case how any of the acts charged herein either strengthened or tended to strengthen Japan and either weakened or tended to weaken the United States of America in its actual conduct of the war.

We would be very much shocked that Japan, even if it had known of the acts which has been charged, to have awarded Tomoya Kawakita an "E" for helping win the war, or that Hirohito would bestow his blessing on him for any of the things charged here. And every soldier of the United States who helped to win the war would resent the thought that these acts intended to help the Government of Japan to the extent of helping them win the war.

* * * * * * *

As said in *Cramer* v. *United States*:

> "Of course the overt acts of aid and comfort must be intentional as distinguished from mere negligence or undesigned ones. Intent in that limited sense is not an issue here. But, to make treason, the defendant not only must *intend* the *acts* but he must intend *to betray* his country by means of the acts."

Like Cramer, it is here that Kawakita defends. A re-examination of the entire evidence shows no intent to betray the United States by means of any of the acts alleged in the indictment.

We have pointed out all the acts in their setting heretofore. We have set out in the appendix the summary of the evidence offered by the Government on the question of *intent* to betray. We challenge the Government to point to any act which shows that Kawakita *intended* to betray the United States by means of any of the acts alleged. After three months of trial, they failed to prove that Kawakita was a traitor to the United States.

Clearly the act must show something toward treason. (*Cramer* v. *United States*, 325 U. S. 29, 30.) Intent to aid the Japanese Military Authority to render summary punishment for burglary, theft and destruction of government property by prisoners in a disarmed labor battalion, and compelling a person not temporarily working to work, and using one's own discretion as to the time to return an injured person to a prisoner of war camp for medical treatment could not weaken, or tend to weaken, the United States to resist or attack the enemies of the United States, nor could it tend to strengthen Japan in the conduct of the war against the United States. There was no intent to betray the U. S. in this.

There was no intent and purpose to strike at the government of the United States in any of the acts charged.

> "Environment illuminates the meaning of acts, as context does that of words."
> *Cramer* v. *United States*, 325 U. S. 33.

> "If the act may be an insignificant one, then the constitutional safeguards are shrunken so as to be applicable only at a point where they are least needed."
> *Cramer* v. *United States*, 325 U. S. 34.

To quote the language of *Cramer* v. *United States*, recording from *Ex parte Bollman*, 4 Cranch. 75, at 125, 127:

"The crime of treason should not be extended by construction to doubtful cases."

Lack of Aid and Comfort of the Degree Constituting Treason

There could be both aid and comfort to Japan and still be no treason. Thus the acts of Dr. Bleich, the senior American doctor in the camp may have given both aid and comfort to Japan. He treated not only Americans but he treated Japanese, and by his presence as a doctor in the Camp, if the theory of the Government is to be followed, there was one less Japanese doctor required on account of his presence and his work there, and treating ill Japanese personnel might have been of some "aid" to Japan. Certainly it was not treasonable. Thus, he may have given aid and comfort, but there was no treason in this for there was no intent to betray.

As said in *Cramer* v. *United States*, 325 U. S. F:

"If there is no intent to betray there is no treason."

Cases of adhering to the enemy are not many. Only eleven reported cases existed under our Constitution. Since that time, two cases have gone to the Supreme Court of the United States, to-wit: *Cramer* v. *United States*, 325 U. S. 1, and *Haupt* v. *United States*, 330 U. S. 630.[15] The *Cramer* and the *Haupt* cases grew out of alleged aid to known enemy agents who came here on a mission of sabotage. They had harbored and sheltered, according to the allegations, saboteurs and concealed their money after they had landed here on a subversive mission. Cramer's case was reversed on

[15] This is the third treason case to receive a review from the present Supreme Court. It is the first ever heard involving acts purely within a foreign government, by one who is a citizen of that government, which is at war with the United States.

the insufficient proof by two witnesses because the court found that the act which two witnesses saw could not on their testimony be said to have given assistance or comfort to anyone—whether it was done treacherously or not. (Opinion of Justice Jackson, 330 U. S. 633, 635, in commenting on the *Cramer* case.)

The court said, also, in *Haupt* v. *United States*, 330 U. S. 634:

> **"We have held that the minimum function of the overt act in a treason prosecution is that it shows action by the accused which really was aid and comfort to the enemy. (Cramer v. United States, 325 U. S. 1, 34, 89 E. Ed. 1441, 1469, 65 S. Ct. 918.) This is a separate inquiry from that as to whether the acts were done because of adherence to the enemy, for acts helpful to the enemy may nevertheless be innocent of treasonable character.**

We submit that an examination of this entire record shows the lack of such acts being of any treasonable character.

The other treason case of adhering was that of *Stephan* v. *United States*, 133 F. 2d 87 (6th Cir., 1943), 318 U. S. 781, 783, 319 U. S. 783.

Justice Learned Hand said, in *United States* v. *Robinson*, 259 Fed. 685 at 690:

> "Nevertheless a question may indeed be raised whether the prosecution may lay as an overt act a step taken in execution of the traitorous design, innocent in itself, and getting its treasonable character only from some covert and undeclared intent . . . Therefore I have the gravest doubt of the sufficiency of the first and second overt acts of the first count and of those of the second count, which consist of acts that do not openly manifest any treason. Their traitorous character depends upon a covert design, and as such it is difficult for me to see how they can conform to the requirements."

D.

The Failure of Proof

1. The indictment charges, and apparently recognizes, in paragraph I that there are two separate elements relating to citizenship necessary to establish the offense:

(1) That the accused is at the time of the acts actually a *citizen* of the United States, and

(2) That he is a *person owing allegiance* to the United States.

The indictment charges in the conjunctive that:

> "Tomoya Kawakita, the defendant herein, was born at Calexico, California, on September 26, 1921 and he has been at all times herein mentioned, and now is, a citizen of the United States of America *and* a person *owing allegiance to the United States of America.*" (Emphasis ours.)

It is the position of the appellant: (1) that Kawakita was a citizen of Japan *owing allegiance to Japan* during such residence and that he was *presumptively expatriated as a citizen of the United States* and therefore, at the time that his American citizenship was presumptively lost, that he was *not* "a person owing allegiance to the United States of America" (2) Since our State Department recognized dual citizenship, throughout the entire period, in its treaty and other relationships with Japan and other countries where dual citizenship exists, and since by Statute such a dual citizen is *presumptively expatriated after six months residence in the other country,* that is, that he is presumptively a non-citizen of the United States, there was a failure of proof that Kawakita was during all times mentioned herein, either a citizen or that he was "a person *owing allegiance* to the United States of America."[16] (3) And, the Court having

[16] The State Department through its consulate in Japan recognized that Kawakita was presumptively expatriated during this period since, in giving him a passport to return to the United States, found that he

instructed the jury, and the Government having conceded that the defendant was a *citizen* of Japan during all times mentioned herein, the charge of treason could therefore not lie, since during that residence in Japan, he owed one hundred per cent allegiance to Japan, as a citizen of that country and none to the United States which had presumptively expatriated him.

In re Territo, 156 F. 2d 142 (9th Circuit);
Ex Parte Quirin, 317 U. S. 1, 87 L. Ed. 3;
Juragua Iron Company v. *United States*, 212 U. S. 297;
Carlisle v. *United States*, 16 Wall. 147;
Perkins v. *Ely*, 307 U. S. 325;
Savorgnan v. *United States*, 94 L. Ed. (Adv.) 203.

It is, further, the position of the appellant that by the laws of the United States he was presumptively expatriated and therefore was presumptively a *noncitizen* of the United States during the entire period of time mentioned herein. It was by operation of law.

This presumption, when overcome, is only overcome as of the date of overcoming it.

Section 402 Nationality Code U. S. C., Title 8, Sec. 802;
Section 315.9 Nationality Regulations.

It could only be overcome if it once existed.

It is further the position of the appellant that by his acts and conduct in Japan he was actually expatriated by operation of the Nationality Act of 1940, having Japanese citizenship, and having reaffirmed his allegiance to Japan; having served in a military area under the armed forces of Japan, and having held a post under the government of Japan.[17]

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had overcome the presumption of expatriation. (Exh. 2F, R. 4175.) He could not *overcome* the presumption unless it *existed* prior thereto and during the period named in the indictment.

[17] The Government of the United States admitted Kawakita's Japanese citizenship during the trial. The Government recognized and therefore stipulated that the defendant had so-called dual citizenship. Such a recognition and stipulation are acceptance on the part of the Government, of the defense that the defendant was a Japanese citizen and as a necessary

We will elaborate later under the heading "the Citizenship of Appellant."

2. Paragraph II of the Indictment charged that "during the times referred to herein, the work and services of

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corrollary that he therefore owed total allegiance to Japan during the period specified in the indictment. Under such circumstances, the Government cannot prosecute the defendant by reason of the Doctrine of Estoppel. See Casey v. U. S., 276 U. S. 413; Sorrells v. U. S., 287 U. S. 434; Olmstead v. U. S., 277 U. S. 438; Nardone v. U. S., 302 U. S. 379, 308 U. S. 338.

It was prerequisite to the Government case for the Government to prove: (1) that the defendant was not a Japanese owing total allegiance to Japan during said period; and that he was still an American whose citizenship the United States Government had not presumptively or actually expatriated. Proving that he did not renounce his American citizenship is not enough under the circumstances. As the court said in his instruction to the jury, an American citizen cannot owe allegiance to more than one country at any given time. If the defendant were a Japanese owing allegiance to Japan at any time during said period, then and in that event he could not be an American owing allegiance to the United States during the period, especially if the court's instruction was correct, that one cannot owe allegiance to more than one country at a given time. This is the same as our contention that petitioner owed 100% allegiance to Japan while a citizen of Japan, living in Japan and receiving its protection, sustenance, and rights of citizenship of Japan.

Tomoya Kawakita was a Japanese citizen during the period specified in the indictment.

The trial court ruled several times during the trial that Tomoya Kawakita could not obtain the Japanese nationality because he was a Japanese from his birth under the Japanese law. It was stipulated that Tomoya Kawakita's parents were born in Japan, and by reason thereof have always been Japanese nationals or subjects owing allegiance to Japan, and that the defendant himself, by reason of his Japanese parentage, was from birth a Japanese national or subject owing allegiance to Japan under the law of Japan.

The court's Jury Instruction No. 11-E (1) reads as follows:

> "It is stipulated that the defendant's parents were born in Japan, and by reason thereof have always been Japanese nationals or subjects owing allegiance to Japan."
>
> "According to the law of Japan, *the defendant himself, by reason of his Japanese parentage, was from birth a Japanese national or subject owing allegiance to Japan.*" (Emphasis ours.)

The defendant, Tomoya Kawakita, was in Japan to which he therefore owed total allegiance during the period specified in the indictment.

The defendant was drafted to work in a munition factory and had

prisoners of war who were members of the Armed Forces of the United States, and who were imprisoned at Camp Oeyama were used and utilized," etc.

The prisoners of war were not members of the armed forces but were members of the disarmed forces of the United States. Once inducted into the labor battalion after their capture by the Japanese Government, they were disarmed and were no longer members of the armed forces of the United States and were then prisoners of war in the control of the country having them. (See discussion in *In re Territo* (9th Circuit) (*supra*), 156 F. 2d 142.

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3. Paragraph III of the Indictment charges "the defendant Tomoya Kawakita, at and near the said Camp Oeyama in Japan, at said open pit or mine and smelter in Japan, *continuously and at all times from August 8, 1944 up to and including August 24, 1945, being a citizen of the United States and a person owing allegiance to the United States,* in violation of said duty of allegiance," etc.

The indictment charged a continuous conduct of treason from August, 1944 until August 25, 1945. Since the jury found as to only eight of the overt acts, there was a variance between the pleadings and the proof of *continuous* treason, and the effect of the verdict was actually a disagreement by the jury as to the continuous character of the treason charged in the indictment. Again, the Government charged in its indictment that Kawakita was (1) a *citizen* of the United States and (2) a person *owing allegiance* to the United States, and (3) in acting in violation of said duty of allegiance. He, at that time, was presumptively expatriated, therefore a noncitizen of the United States. The proof showed he was a resident of Japan, a citizen of Japan,

been employed under jurisdiction of the Japanese military government during all times mentioned in the indictment.

The defendant himself believed that he was a Japanese owing total allegiance to Japan during all times mentioned in the indictment. (See his testimony.)

and owed 100% loyalty to the Government of Japan and therefore owed *no duty of allegiance* to the United States.

* * * * * * *

4. The indictment continues that "he did knowingly, intentionally, wilfully, traitorously and treasonably adhere to the enemies of the United States." It is the position of the appellant that he was a part of the enemy, he did not adhere to them and his acts were not knowingly, intentionally or wilfully done, but in the performance of his duty to the Government of Japan where he was then residing.

The evidence showed, without contradiction, that he thought that he was a Japanese subject; the Government of the United States is estopped because the Statutes told him so; the regulations of our State Department told him so; and he was drafted for service in Japan and therefore was not acting knowingly, intentionally, or wilfully or traitorously or treasonably.

* * * * * * *

5. Paragraph IV [18] of the indictment charges the afore-

[18] Although this was the charging part of the indictment, the defendant was not actually tried on this charge as laid. The Government tried the case on the theory that the defendant compelled prisoners of war to perform more labor than they were actually performing (although not more than they were required to perform) and that in so doing he acted "beyond the obligations of his employment". (See Government's brief, page 19, line 5.) This is entirely different than the charge as laid, which was that he compelled prisoners of war to *perform labor*. In the only two overt acts, to wit (a) and (j), relating to performing labor, both Toland and Armellino were performing labor by compulsion of the Japanese Government and the military authorities in command. This was conceded. What the Government tried Kawakita for, therefore, was not in compelling Toland or Armellino to "perform labor" as alleged in the charging part of the indictment but performing "more labor" than they were performing, as *not alleged* in the indictment. Thus while previous treason cases have raised the sufficiency and character of the overt acts, we challenge the trial upon a charge not made by the charging part of the indictment, and the conceded and admitted facts disproving the charge as laid in paragraph IV. Thus petitioner was convicted on a charge never tried as laid, and on a charge that was never made and was in violation of due process. Cole v. Arkansas, 333 U. S. 196; 92 L. Ed. 644; De Jonge v. Oregon, 299 U. S. 353; 81 L. Ed. 278; Albrecht v. U. S., 273 U. S. 1, 8.

said adherence of said defendant, Tomoya Kawakita, and giving of aid and comfort by him to Japan during the period aforesaid "consisted of serving as interpreter and foreman at the said prisoner of war camp, and at said open pit or mine and smelter, and in said capacity as interpreter and foreman of *compelling members* of the armed forces of the United States, who were then and there held by the Japanese Government as prisoners of war, *to perform labor* at said open pit or mine and smelter."

The uncontradicted evidence shows that the defendant was drafted by the Japanese Government as an *interpreter* by the Japanese Government and was working at the said prisoner of war camp at Oeyama under such draft; that prisoners of war were there by operation of treaty, statute and regulation, and that the defendant had nothing to do with their being in the prisoner of war camp; that they were required to perform the labor assigned to them by the Japanese Government, and therefore that he was not *compelling them to perform labor at said open pit or mine and smelter,* but that such compulsion was by operation of International Law, Treaty arrargement with Japan and the United States through the exchange of telegrams and operation of law. That there were no *armed forces* as prisoners of war—they were *disarmed* forces, disarmed by conquest of Japan, and were a labor battalion within the power of Japan (See exchanges of telegrams attached to Exhibit CU).

* * * * * * *

6. The indictment further continues, "and of *directing* and assisting the Japanese Military Forces having charge of the prisoners of war at said Camp Oeyama in the imposition of discipline and punishment on said members of the Armed Forces of the United States." It was conceded in the trial that Kawakita did not direct the military forces, that Japanese military forces were in charge of the camp

and they did all the directing, including threats of death to anyone who did not carry out their orders, and of themselves imposing summary punishment on prisoners of war who were guilty of theft, conspiracies to disobey the military authorities, theft of scarce and rationed foods, and destruction of government property, and that the summary (although severe punishment imposed) was the only punishment given to them—*at the direction of the military forces* and not at the direction of the defendant.

It was further conceded by the Government that the other persons involved were not members of the armed forces of the United States but were disarmed forces in captivity as a labor battalion "compelled to perform labor at said open pit ore mine and smelter" by the Japanese Government under the Treaty with the United States—Utilization of members of the armed forces to produce minerals, metals, and products to be used in the manufacture of arms, materials and munitions of war" was also arranged, directed and controlled by the Japanese government through its military officers, a fact not disputed. The government's case therefore shifted to a theory that Kawakita's alleged acts were to produce *more* minerals, metals, and products than they were producing. This was not the charge as laid and violated due process. *Cole* v. *Arkansas*, 333 U. S. 196. An indictment in its charging part must inform the accused of the "nature and cause of the accusation with clearness and all necessary certainty." Every ingredient of the offense must be clearly and accurately alleged. *U. S.* v. *Cruickshank*, 92 U. S. 542; *U. S.* v. *Cook*, 17 Wall. 174, 21 L. Ed. 539, Amendment VI U S Constitution.

Nothing in the charging part of the indictment forms any basis for overt act (i), the Johnie T. Carter incident, wherein the defendant assertedly delayed Carter's removal to the camp after injury for five hours. It neither fitted into the allegations of compelling labor nor imposition of discipline.

It is the position of the appellant that, in this setting,

there could be no treason, and that Kawakita was convicted not upon the charge as laid but upon a charge not laid.

* * * * * * *

7. The balance of the charge contained in paragraph IV, regarding the imposition of discipline and punishment on such disarmed forces of the United States, might have constituted war crimes if they occurred but did not constitute treason. Control and discipline was authorized by international law, and treaties (Articles 4, and 8, Treaty 539. Appendix of Petitioner page 5; Treaty 846, chapter 3, Article 45, page 5, appendix).

The indictment further alleges that the aforesaid activities of Kawakita, would, tended to, and did assist the Japanese Government to utilize members of the *armed forces* of the United States, and the proof showed that they were *disarmed labor battalions* in the control of the Japanese Government, then a nation, pursuant to International Law and the use of these members of the disarmed forces was by operation of International Law and Treaties and not by reason of anything that Kawakita did or could have done.

* * * * * * *

8. The overt acts charged and found by the jury were eight in number—each of them alleged acts directed toward a prisoner of war, which the indictment erroneously calls "A member of the armed forces of the United States." The proof was that each of the men was a disarmed member of a labor battalion, and not then and there a member of the armed forces of the United States.

None of these overt acts spring even remotely from or in aid and comfort and contact with the Government of Japan.

* * * * * * *

9. The language of the indictment attempts to justify and excuse the crimes of the prisoners of war against the

Japanese Government and in violation of the regulations of the prisoner-of-war camp.[19] Each of the punishments alleged to have occurred at the direction of the military authorities was for violation of serious infractions of Japanese law and Japanese Military Regulation, and could have called for punishment up to death for conspiracy to violate such laws and regulations.

At all times mentioned in the indictment, Japan was a Nation with its own Sovereignty and its own laws. It had conquered and disarmed and imprisoned the men in the prisoner of war camp at Oeyama, and Japan had, shortly after the outset of the war, entered into binding agreements through the Swiss Government with the United States to maintain prisoner of war camps in accordance with the terms and provisions of the Hague Treaty. It, also, had laws for punishment for damage to government property; for theft of rationed foods, and for the maintenance of prisoner of war camps.

Pursuant to its own laws, prisoner of war camps were maintained, controlled and operated by the Military authority. The camp at Oeyama was in charge of a Military Commander, Lt. Hazama and two Japanese Sergeants.[20]

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[19] It makes the criminal under the terms of the treaty and Japanese law, the victim under our law of a treasonable act and project. But treason is a crime in aid of a foreign government and not some isolated acts of punishment of individuals for their own criminal misconduct.

[20] Of course Americans were delegated to supervise other Americans. Sgt. Montgomery brought the prisoners over to Japan from the Philippines. (R. 202 et seq.) He was a "so-hancho" or petty officer under the Japanese to direct the work of the Americans. He and other sergeant prisoners of war, Lt. Bleich, Major Beadnall, Sgt. McElhaney, and others set up their own "court" to discipline prisoners of war who stole, were recalcitrant, unruly, or committed crimes or violated rules or regulations. (R. 238, 260.) The Japanese forbid stealing, and particularly from the garden because the gardens were being fertilized with human excreta. Four Britishers caught stealing were punished by beatings. See testimony of Lt. Bleich. (Appendix, pp. 112-113.) Americans caught stealing were beaten or slapped around a bit. R. 237, 238.

The defendant was drafted by the Japanese Government in his job at Camp Oeyama. [Exhibit AB-I.]

Thirteen overt acts, all within the confines of Oeyama Camp or mine, were submitted to the jury. The jury found against the defendant on eight of them.

* * * * * * * *

10. Of the eight overt acts found by the jury against the defendant: Five were punishment acts in which the military authorities of Japan were imposing summary punishments for stealing scarce and rationed foods, for breaking into the storehouse and committing burglary, for cutting up and destroying government property (blankets), and for returning from work earlier than scheduled. Another overt act was allegedly for not moving an injured man from the place of his injury to the camp for a period of a few hours. Another overt act was kicking a man "to compel him to greater exertion," when he was not exerting himself at all. And, the other overt act was in causing a prisoner of war to carry two buckets of paint instead of one bucket of paint—all in Japan at a time when it was a nation at war with the United States, and with whom there were treaty arrangements for the government of prisoners of war.

It was shown in the trial that these overacts of punishment were directed and carried out by the Military Authorities, and that the defendant was subject to their direction and command under threat of death. Nowhere throughout the trial was it shown how these acts gave any "aid or comfort" to the government of Japan.

Sergeant Montgomery, a counter-intelligence officer of the United States, who himself from time to time slapped American prisoners of war for stealing, was in charge of the American prisoners of war in the camp. No charge

of treason was ever lodged against him. He was a government witness in this case [R. 227-37; 318].

. . . . . .

11. Immediately after the surrender of Japan, the American forces who were then prisoners took over the camp and the defendant was subject to their orders and commands. He assisted them throughout the entire period and until their departure. They used him as their principal interpreter. Had he been guilty of treason, they were required by law to have revealed the fact and court-martialed him or else they themselves were guilty of *misprision of treason* (Title 18, Section 3, U. S. Codes 1946 Edition). No prosecution occurred in Japan, although the defendant repeatedly reported to the Military Authorities subsequent to his departure and while awaiting his American transportation, and also to the American Consulate, which gave him a clearance and overcame (in 1946) the presumption of expatriation, as of June, 1946, which had theretofore covered and cloaked the defendant. Such administrative decision in 1946 did not overcome the statutory presumption cloaking the defendant at all times herein.

. . . . . .

12. The Government of the United States, by the terms of the Nationality Act of 1940, told Kawakita that he was presumptively expatriated—that is, that he was a non-citizen—during this period of time and, therefore, told him that he presumptively owed no allegiance to the Government of the United States. The State Department Bulletin and Regulation 315.9 also told Kawakita that the political policy of the United States was not to afford protection to dual citizens residing in the country of their other citizenship, and that they owed paramount allegiance to that Government and not the Government of the United

States. It is the position of the appellant that under no circumstances herein set out could Kawakita be guilty of treason for allegiance to Japan and that the Government of the United States is estopped by law and by its regulations from prosecution under the circumstances herein.

It is further the position of appellant that there was no proof of any intent to betray the United States and that the overt acts were trivial and inconsequential in their setting and did not and could not give aid and comfort to the Government of Japan.

Let us look at each of the overt acts. We have set out in the appendix a complete summary with page references to each witness as to each over act. We may say by preliminary that the government did not urge in the trial that intent to betray could be gathered from any of the overt acts. They attempted to prove intent to betray from separate evidence. To this we will advert later.

The Insufficiency of the Overt Acts

Preliminary to taking up each of the eight overt acts, we may specify that none of the allegations in the indictment, or the proof offered in support of those allegations was definite and specific. The dates were vague, general and conflicting. Times and places were at variance and no substantial evidence was offered that the acts alleged could not have taken place more than once or twice, or were not of such a nature that they could or did not occur more than once.

If it be said that the time of trial was long removed from the alleged dates of the occurrences, then it is the Government which was lax in the matter of bringing the allegations and charges timely and it must bear the consequences. This is not a case where there was a discovery of an alleged offense long after its occurrence. If

it occurred at all, it occurred while all of the Americans were in the camp, and in a period when there were at least 45 American officers present, and one American captain, a doctor, was at all times in charge of the camp and received reports of any physical occurrences to any of the men. He kept a complete diary and medical records. None of them contain a single report regarding Kawakita.

In charge of the Americans, and as the Japanese called him "So Hancho," was the American Spy, Chief Counter-Intelligence Officer, Sergeant Montgomery.

Winthrop's Military Law and Precedents, Second Edition (Army Document 1001), page 776, says:

> "ARREST AND RESTRAINT OF PERSONS. The Laws of War authorize the arrest, trial and punishment of such of our own people as may become chargeable with relieving or communicating with the enemy, carrying on illicit trade or intercourse, or other violation of those laws. The liability and disposition of such offenders has already been in part considered under the 45th and 46th Articles of War, and will be further discussed in treating of the jurisdiction and powers of the Military Commission. The restraints which may be exercised over the citizen will also enter into the consideration of the subject of Martial Law." (Winthrop's Military Law and Precedents, Second Edition, page 776.)

If any of these acts occurred as alleged, they occurred prior to the Americans taking over the camp. Immediately after the Americans took over, Major Martin (American) was placed in charge of the camp. The American flag was raised and Sgt. Montgomery became the non-commissioned officer in charge. Discipline in the American style followed.[21]

If treason had occurred, it was then the duty of the Amer-

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21. Fifteen American prisoners of war immediately went AWOL.

ican officers and men to arrest the defendant immediately. In fact, Title 18, Section 3, makes anyone who fails to report treason immediately guilty of misprision of treason.

Even the Japanese officers in charge of the Camp were placed under arrest a short time after the termination of the camp for so-called war crimes. But not the defendant.

Kawakita not only was about the camp daily, after the Americans took over, but assisted the American officers throughout in locating food, taking their parties on excursions, and finally in helping them to entrain. This is not the badge of treason, and if he were guilty of treason, the doctors and men would not be slow to express their personal animosity toward him, rather than have him accompany them, set up their prophylactic station, and be selected as the favorite interpreter for the purposes of locating food, explaining to civilians whose homes had been hit by the dropping of packages and babies injured, giving apologies, etc., and all the other things that the defendant did.

And, significant indeed, is the fact that he went to work in Japan thereafter. He did not seek immediate return to the United States, but was at all times available to the Americans while in Japan.

It was not until four months afterwards that he sought the advice and information from the American Consulate as to the possibility of returning to the United States, to continue his education in this country. Significantly enough, his address was at all times known to the American Consulate and he was thoroughly investigated by the Counter-Intelligence Corps, which gave a favorable report to the American Consulate at the time.

He did not leave Japan until August, 1946. He reported constantly to the Eighth Army in Japan.

Surely, if he was guilty of treason at a specific time and date, it was the duty of the American officers and men, as

well as the Counter-Intelligence Corps of the Army and the American Consulate to have brought those charges forthwith.

Therefore, the failure to bring the charges, if they had any logical basis, at a time when the facts could actually be established with certainty and definiteness by the direct testimony of two witnesses was the responsibility of the Government, which it failed to exercise.

We shall talk about this more under our heading on the "Denial to the defendant of his Constitutional rights of Speedy Trial."

Coming now, however, to the lack of proof of overt acts by the testimony of two witnesses, we start out with the basic principle announced in *United States* v. *Robinson*, 259 Fed. 695, that the overt acts must be established by direct evidence of two witnesses to the entire or whole overt act.

And see also:

Cramer v. United States, 325 U. S. 1.

Overt Act (a) was the Toland incident. This act was as follows:

> "(a) Defendant Tomoya Kawakita, on a date in May, 1945, the exact date of which is to the grand jury unknown, at the said smelter operated by the company near Camp Oeyama, did direct the work of Phillip D. Toland, a member of the armed forces of the United States who was then and there a prisoner of war, to compel him to remove rock from the road-bed and track of a railroad used in the operation of said smelter, and did kick the said Phillip D. Toland to compel him to greater exertion in said work."

The work was directed by the military authorities, not by Kawakita.

Toland himself said that the alleged occurrence was June, 1945. He was unable to specify the exact date, he said it occurred in June, 1945. He put a mark on the blackboard with a "T" on Plaintiff's Exhibit 25, which was different from the mark put there by other witnesses, and it was an entirely different location. The other witnesses said that it occurred some time in May, 1945. None of them had any specific date or time, or exact specification, nor did any of them establish that it was done to compel Toland to *greater* exertion.[22] Toland was not exerting himself at all at the time, according to his own testimony. According to Dr. LeMoyne Bleich, M. D., the only officer in charge of the men, Toland was then assigned "light duty" on the garden party and was not working at the smelter. Dr. Bleich's daily card record so shows (R. 3409) and had been since April 21, 1945, thus contradicting all the dates of the other witnesses.

The requirement of two direct witnesses is: "Two direct witnesses to the same occurrence, or some part of the same occurrence." Can anyone say that all these witnesses saw the same incident at the same time and same place, and on the same date, or at all? Surely the testimony leaves much to be desired—in fact, it is entirely lacking in substantial proof of all of these required elements to be the direct testimony of two witnesses, as required by the Constitution.

Haupt v. *United States*, 330 U. S. 630.

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[22] Philip Daniel Toland, in his statement to the Intelligence Corps, made on November 16, 1945, shortly after he returned to the United States and within a few months after he left Camp Oeyama, described one incident that allegedly occurred on August 1, 1945, in the morning, when according to his statement:

"I was not marking time and he called m by number in Japanese." He said he was then ordered out in front of the whole group and struck with the left hand of the guard, whose right arm was paralyzed, and he did not know or remember the name of the guard. He in nowise mentioned Kawakita [See Exhibit AG], nor any other incident at the camp to which is testified in this case.

The evidence as to Overt Act (a) showed that Phillip D. Toland was a prisoner of war and that his work was being supervised and directed by the military authorities of Japan. Lt. Hazama was in charge, not Kawakita. The amount, quantity and duties of Toland were outlined by the military authorities (R. 4064).[23]

The next incident was the Grant incident, which is Overt Act (b), as follows:

> "(b) Defendant Tomoya Kawakita, during the latter part of April, 1945, the exact date of which is to the grand jury unknown, at said Camp Oeyama did direct and participate in the following inhuman and degrading punishment of one, J. C. Grant, a member of the armed forces of the United States who was then and there a prisoner of war at said Camp Oeyama; said J. C. Grant was knocked into the drain or cesspool of said camp by his Japanese guards and was repeatedly and violently struck and beaten by the defendant and the said Japanese guards as he attempted to get out of the pool, thereby sustaining injuries, shock and exposure."

We have set out in our appendix a summary of the testimony with page references of each of the witnesses to each of the overt acts found by the jury.

The testimony was uncertain as to the date, time and place of the incident. Grant himself had gone through an experience of this kind twice for stealing. He did not identify the defendant as one of those who participated.

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[23] No *treasonable project* was shown in connection with the Toland incident. Nor was there any proof of paragraph IV, the charging part of the indictment in connection with the overt act. In a treason prosecution the charging part of the indictment is essential to be proved as alleged or the overt acts by themselves prove nothing. U. S. v. Button, 107 U. S. 655; U. S. v. Philadelphia & R. Ry. Co., 232 F. 953; Cramer v. U. S., 325 U. S. 1; U. S. v. Robinson, 259 Fed. 685; U. S. v. Burr, 25 Fed. Case No. 14692a; charge to grand jury, 30 Fed. Case No. 18273, 1 Sprague 602. What we have here said applies with equal force to each of the overt acts.

The whole of the overt act was not proved. The evidence is uncontradicted that Kawakita did not *direct* the punishment of Grant, but that it was directed by Sergeant Ichiba and Akamatsu.

The indictment does not state that Grant was a thief—stealing and burglarizing a storehouse in Japan. While our sense of fellow feeling for Americans may rise up against the use against even a thief of this old "ducking stool" method—once used in the United States for punishing gossiping women who talked too much, nevertheless the proof is lacking that Kawakita *directed* any inhuman or degrading punishment of Grant, or that Kawakita knocked Grant into the drain or cesspool, or that Kawakita was responsible for Grant sustaining any injuries. Dr. Bleich, who was nearby at the time and advised Grant to move about in the pool, did not see Kawakita, and the evidence is entirely lacking by the testimony of two witnesses that this occurred, on a particular date or time, in April, 1945, or that it occurred only once. Grant was questioned after the war on war crimes and did not mention Kawakita in his statement. Furthermore, Grant received no other punishment, although for this type of burglary, even in this country, he might have been imprisoned at hard labor for four years—and, in Japan the Regulations governing the prisoner of war camp called for as much punishment as death.

Furthermore, on March 1, 1945, Kawakita was assigned to work as a clerk in the warehouse, and was in charge of clerical work in the warehouse and was not an interpreter in the camp (R. 4099). Kawakita denied the act charged and Grant himself did not identify the defendant as participating.[24]

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[24] In a treason case, where the crime is defined by the Constitution we deem that this court must for itself re-examine all the evidence to see if it measures up to the constitutional standard, regardless of the findings below, just as it does in cases involving a denial of due process of law

Overt Act C

Overt Act (c) sets forth the third overt act found by the jury, as follows:

> "(c) During December, 1944, at Camp Oeyama, on a date to the grand jury unknown, the defendant Tomoya Kawakita and the Japanese guards did line up about thirty members of the armed forces of the United States who were then and there prisoners of war in Camp Oeyama and as punishment of said prisoners of war for making mittens and shoe linings from pieces of blankets for protection from cold weather conditions and did at said time and place strike and beat them and force them to strike and beat each other."

Again, this overt act is a justification for American prisoners of war destroying Government property. The evidence is entirely insufficient to show that Tomoya Kawakita "did line up about thirty members of the armed forces of the United States." The punishment for the wilful destruction of Government property was decreed by Lt. Hazama and Sgt. Ichiba and Akamatsu, Kawakita did not line up any of the prisoners of war and, of course, they were not *members* of the armed forces but were disarmed forces.

Kawakita did not provide the punishment and there is no proof that the making of the mittens, or any use of cutting up a government property illegally was necessary as protection from cold weather.

There is no evidence by two witnesses that he did strike any one person, or beat any one person, or that he forced any one to strike another person or beat another person. The orders were all a part of the Military.

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guaranteed by the constitution. This court has repeatedly said it will re-examine the evidence and determine for itself whether due process has been denied. Lisenba v. California, 314 Cal. 219; 86 L. Ed. 166; Chambers v. Florida, 309 U. S. 227; Ashcraft v. Tennessee, 322 U. S. 143; Malinski v. New York, 324 U. S. 401. This court re-examined the evidence in Cramer v. U. S., 325 U. S. 1, Haupt v. U. S., 330 U. S. 631.

Kawakita, then working as a warehouse clerk, denied any participation.

Overt Act D

Overt Act (d) charged Kawakita in August, 1945, as follows:

> "(d) During August, 1945, the exact date of which to the grand jury is unknown, the defendant Tomoya Kawakita, at Camp Oeyama, did impose punishment on one Thomas J. O'Connor, a member of the armed forces of the United States and then and there a prisoner of war in said camp, for a breach of camp rules by assaulting, striking, and beating said Thomas J. O'Connor and repeatedly knocking him into the drain or cesspool of the said camp, causing the said Thomas J. O'Connor temporarily to lose his reason."

Proof as to this overt act was also insufficient. O'Connor at no time said Kawakita participated in punishing him for a breach of the camp rules in August, 1945 (R. 5261-2). Nor was there any reference to Kawakita in his report to the Navy investigating war crimes after the close of the war. Dr. Bleich's records reveal no report of Kawakita. The men generally described Ichiba and Akamatsu as being the ones who punished O'Connor after he was caught stealing. Dr. Bleich's record shows Sgt. Ichiba, Akamatsu and Corp. Kondo. No mention is made of Kawakita.[25]

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[25] In his statement for the War Crimes Office, Thomas J. O'Connor, on August 26, 1946, said that in relation to the incident alleged in the indictment:

> "Q. Did you receive any other beating while at this camp? A. Yes. Around 1 August 1945, I broke into a Japanese warehouse with two other men. I escaped, but the other two were caught and beaten so badly that I confessed my part in the affair. The Japanese then ceased beating the other men and concentrated their efforts on me. . . .
>
> Q. Can you identify or name any of the Japanese responsible for this incident? A. Yes, I was beaten by the two Sergeants at the

The Insufficiency of Overt Act (g)

Overt Act (g) is as follows:

"(g) On a date in July or August, 1945, the exact date of which is to the grand jury unknown, a work detail consisting of members of the armed forces of the United States who were then and there prisoners of war at said Camp Oeyama, including in their number one David R. Carrier and George W. Simpson, returned thirty minutes early from their assigned duties as such prisoners of war and were compelled by the Japanese sergeant in charge to run twice around the inner quadrangle of the building of said camp and thereafter the defendant Tomoya Kawakita did compel the said David R. Carrier and George W. Simpson, who were unable to run fast enough by reason of illness resulting from their captivity, to run an additional four times and six times respectively around said quadrangle of said camp."

The act itself alleges two different dates in 1945. Neither date was established nor any specific date was established by any or all of the witnesses, or two direct witnesses to the same overt act. The constitutional requirement means two persons who saw the whole of the same act or such portion

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Camp—Ichiba Goonsaw (1st Sgt.) and Akamatsu Goonsaw (Sgt.) . . .

Q. Who do you think was responsible for these conditions? A. The Camp Commander. . . .

Q. Can you name or otherwise identify any of the Japanese officials at this camp? A. No. I don't recall the name of the camp commander. A man by the name of Marista San was in charge of the galley."

O'Connor also described an incident that allegedly occurred while Kawakita was in China, to-wit; in the middle of August, regarding a Private in the Marine Corps named Killer (nicknamed Foghorn), "who was punished for eating a radish and" the rough treatment resulted in his death two weeks later. There is no such record. The records of the camp and the testimony of Dr. Bleich did not reveal any such alleged occurrence. [See Exhibit AK.]

of the act. The evidence did not show that there was a work detail consisting of members of the armed forces—but there was a detail of disarmed forces. There was no proof that Tomoya Kawakita *did compel* David R. Carrier and George W. Simpson to run an additional four times and six times respectively around the quadrangle of said camp, but said compulsion, according to the testimony, was by the Japanese Sergeant who also stopped the running around the compound (R. 281). Kawakita at no time compelled either men to run additional times and that was ordered by the Sergeant. Nor is there any proof by any authorized authority qualified to testify that they were "unable to run fast enough by reason of illness." Dr. Bleich did not testify to that effect and the testimony of the men themselves is that they did run around the quardangle. Furthermore, this transaction was allegedly punishment for violation of a rule of camp, directly under the military authority. According to the testimony of one witness, running around the compound is a mild form of military punishment and used to be common strict discipline for breach of the camp rules in the United States army also.

The Insufficiency of Overt Act (i)

Overt Act (i) alleged as follows:

> "(i) That on or about December 17, 1944, at or near the said open pit ore mine, the defendant, Tomoya Kawakita, did order and compel Johnie T. Carter, then and there a member of the armed forces of the United States and a prisoner of war at Camp Oeyama, to carry a heavy log up an ice-covered slope that the said Johnie T. Carter, who was then and there suffering from malnutrition and in a weakened physical condition, slipped and fell and received a serious spinal injury; that the defendant, Tomoya Kawakita, then and there denied medical care to the said Johnie T.

Carter and delayed his removal to Camp Oeyama for a period of approximately five hours."

There is no proof of any credible witness and the evidence does not establish that Kawakita "ordered and compelled Carter to carry a heavy log up an ice-covered slope" but that Carter was under orders of the Military to carry the log. There is no evidence that Carter was suffering from malnutrition and in a weakened condition, when he slipped and fell, other than those similar to all the prisoners who were working. There is no evidence that Kawakita denied medical care to the said Johnie T. Carter, nor that he delayed his removal to Camp Oeyama for a period of approximately five hours.

Carter, who was injured, was not moved and it is said to be good medical technique not to move a man in his condition except by competent medical orderlies or persons familiar with the possible injury. There is no evidence that any medical orderlies were immediately available. One witness testified that Kawakita said he would have the medical orderlies take him. There is no evidence that there were any facilities to remove Carter back to the camp before the time that he was actually moved on the trains regularly going back to the camp where he received medical attention.[26]

The Insufficiency of Overt Act (j)

Overt Act (j) is as follows:

"(j) On a date in May, 1945, the exact date of which is to the grand jury unknown, the defendant Tomoya Kawakita, at a warehouse near Camp Oeyama, did order and command John J. Armellino, a member of the armed forces of the United States, who was then and there a prisoner of war at said Camp Oeyama, and weak and emaciated, to carry for a distance of approximately 500 feet two heavy buckets of white lead

[26] Nothing in the charging part, paragraph IV of the indictment covers this overt act. It was neither compelling labor nor enforcing discipline. It would extend the disablement of a worker and thus give less "aid".

instead of one bucket which Armellino had been carrying, and did then and there strike and beat the said John J. Armellino in order to compel him to perform this labor."

There is no evidenec that Kawakita ordered and commanded Armellino to carry the paint, but there were apparently orders for *all prisoners of war to carry two buckets of paint* and Armellino was not carrying out the order. There is no evidence that Armellino was a member of the armed forces but was a disarmed member of the work battalion. There is no evidence that Armellino was weak and emaciated any different than any other prisoners of war. There is no credible evidence that Kawakita struck Armellino in order to compel him to perform this labor, which he was required in any event to perform.

The Insufficiency of Overt Act (k)

Overt Act (k) charges as follows:

"(k) That on a date in the late spring or early summer of 1945, the exact date of which is to the grand jury unknown, the defendant, Tomoya Kawakita, within the confines of Camp Oeyama, did participate in and assist Japanese military personnel of Camp Oeyama in directing and executing the following cruel, inhuman, and degrading punishment of Woodrow T. Shaffer, a member of the armed forces of the United States who was then and there a prisoner of war of the Japanese government at Camp Oeyama, to-wit, the said Woodrow T. Shaffer was forced to kneel for several hours on a platform with a stick of bamboo placed on the inner side of the joints of his knees and to hold at arms length above his head a bucket of water and subsequently a heavy log, and was then and there struck and beaten by the said Tomoya Kawakita,"

There is no exact date specified. Shaffer stole beans—a most serious infraction of the laws of Japan and the camp

rules and regulations. (R. 237, 238, 260) He admitted his crime to the Japanese Military which imposed the punishment. There is no evidence that Shaffer was a member of the armed forces but was a member of the work battalion. The evidence is that the Military personnel caused him to kneel and it was the Military personnel who carried out the punishment of Shaffer for his serious infraction of the rules of the Military personnel.

There Were No Two Direct Witnesses of a Clear and Convincing Nature to the Same Overt Acts

Dates were uncertain, the surroundings and the circumstances were uncertain and each of the acts could have been committed—if they were committed at all—on more than one occasion.

Sgt. Montgomery, although an intelligence officer for the army, could not at the date of trial even recall the name of the American officer in charge of the camp after the Americans took over—although that officer was in charge for practically a month in the camp (R. 358), and he wasn't even sure of the name of the camp captain (R. 359) who was camp adjutant, and he wasn't sure whether a roll call was held (R. 359).

Photographs were obtained from Japan by the defense counsel of the Japanese officer (Lt. Hazama, nick-named "The Pig," Ex. B), Sgts. Ichiba (Ex. C) and Akamatsu (Ex. D), the active Japanese non-commissioned officers in charge. Corporal Kondo, and two photographs (Exs. H and I) of American and British and Canadian officers and men taken at Camp Oeyama at the close of hostilities.

Sgt. Montgomery, a trained investigator could not identify the individuals in the picture. See reverse side of Exhibit H. He was allowed to study the photographs during the noon recess and the writing was his own com-

ment and testimony. On Exhibit "I" he was only able to identify two named persons.

Of the Japanese personnel most of the witnesses were not even able to identify Lt. Hazama whom they disaffectionately named "The Pig"—until his picture and identification was published in a Los Angeles newspaper and the witnesses were stopping at the Hotel Northern in Los Angeles and discussing the testimony and pictures amongst themselves (R. 394, 406).

The case of treason stands upon a peculiar ground; there the overt acts must by statute be specially laid, and must be proved as laid.

United States v. *Gooding*, 12 Wheat (25 U. S. 473, 475);
United States v. *Wilson*, 28 Fed. Case No. 16,730, 699,718
United States v. *Robinson*, 259 Fed. 685;
Ex parte Bollman, 8 U. S. 75;
Cramer v. *United States*, 325 U. S. 1;
Haupt v. *United States*, 330 U. S. 631.

This the government failed to do.

* * * * * * *

Wimmer v. *United States*, 264 Fed. 11;
Equi v. *United States*, 261 Fed. 53;
United States v. *Herberger*, 272 Fed. 278;
Chafee: *Free Speech in the United States*, pp. 259-260;
Hurst: *Treason in the United States*, 58 Harvard Law Review 430. (This is a complete historical summary of the law of treason.)

Defendant Believed He Owed Total Allegiance to Japan While in Japan

The evidence regarding Kawakita's state of mind at that time did not meet the burden of proof required of the

Government to show that Kawakita did *not in fact believe* that he was 100% Japanese during the times mentioned in the indictment or to show that he had any intent to betray the United States.

The proof was all to the contrary.

The defendant, at all times, believed that he was a citizen of Japan owing his entire allegiance to Japan. The very evidence cited above to show "intent" if it proves anything, it proves that the defendant regarded himself as totally Japanese. Therefore, even though it might be argued that he was a dual citizen and therefore also a citizen of the United States under the Fourteenth Amendment, the entire evidence in this case is uncontradicted that he was a citizen of Japan owing allegiance to Japan, and that he therefore had at no time any intent to betray the United States.

III

(A) The Trial Judge Erred in Holding That Venue Existed at Los Angeles, California and That the Trial Court In California Had Jurisdiction and That He Was Not Denied a Speedy Trial in Japain.

After the surrender of Japan, Camp Oeyama was taken over by the United States officers. Its consular officers were re-established; and they again became invested with the power to try all cases (Title 22, U. S. C. 141-145). They necessarily were still governed by the provisions of the Treaty of 1858 (*Ross v. McIntyre*, 140 U. S. 453, 35 L. Ed. 581; *Clark* v. *Allen*, 331 U. S. 508). Major Martin was placed in charge. It become a Military occupation, or district. Military Commissions were also organized and ready to try any offender.

United States v. *Rice*, 4 Wheat. 246;

Croft v. *Harrison*, 16 Hiel 164;

Leitensdorf v. *Webb*, 20 Hiel 176;
The Grapes Hot, 9 Wall. 129;
New Orleans v. *Steamship Co.*, 20 Wall. 387;
Dooley v. *United States*, 182 U. S. 222;
MacLeod v. *United States*, 229 U. S. 416;
Ex parte Quirin, 317 U. S. 1, 87 L. Ed. 3;
In re Yamashita, 327 U. S. 1.

Defendant Denied Speedy Trial at Place of Alleged Offense

Under the Sixth Amendment to the Constitution of the United States, the defendant was entitled to a speedy trial and in Japan, since it was by occupation a part of United States territory. He could have been tried by court martial if there was the slightest basis of the charges (Article 33, 81 and 82, Articles of War) or by the American Consul or by a Military Commission.

Under Title 18, Section 3 (1946 Edition), any person who failed to report treason immediately was guilty of misprision of treason.

Not only did Congress provide court martial punishment for prisoners under the circumstances, but by the laws of war Military Commissions were authorized; but under the circumstances Kawakita became technically a prisoner of war himself, upon the Americans taking over the camp, and he could be prosecuted and punished in accordance with the Laws of Wars, or the Laws of Nations, or both, and in accordance with our own court martial procedure.

Title 22, Sections 141 and 142, U. S. C. A. give jurisdiction to the American consul-general to try criminal cases in Japan. The Treaty of the United States with Japan of June 17, 1857 and the Treaty of July 29, 1858 provide that Americans committing offenses in Japan should be tried by the American consul-general.

Title 22, U. S. C. A., page 72, Sections 140, 141, and see *Ross* v. *McIntyre*, 140 U. S. 453, 35 L. Ed. 581, affirming *In re Ross*, 44 Fed. 185.

The law provides that the trial of all offenses committed on the high seas shall be in the district where the offender is found, or into which he is first brought, includes the jurisdiction of the consul-general to try offenses.

Under Title 22, Section 145, jurisdiction in both criminal and civil matters shall, in all cases, be exercised and enforced in conformity with the laws of the United States.

The Americans took over the camp on August 15, 1945 (R. 350). Sgt. Montgomery was an investigator for the United States Army. The Americans began taking excursions around Miyazeu Bay at that time with Japanese (R. 357). Kawakita was in and around the vicinity of the camp (R. 355) from August 15 to September 10th or 11th, when the men left the camp (R. 356). American officers maintained military regulations (R. 358). They took over the Japanese headquarters (R. 358). Fifteen men took off from the camp and were not seen again (R. 359). But Kawakita was not only around there, he went to the American Consulate repeatedly and to the 8th Army of Occupation. If he had committed treason he would have been arrested and prosecuted then, and there would not have been a delay of two years and a treason case which took seven months to manufacture after Kawakita was seen in the United States.

If Kawakita was guilty of treason, every one of the prisoners of war and witnesses for the government who testified against him were guilty of misprision of treason in not reporting it promptly. We assume, rather, that they did not commit misprision of treason and by the same token that Kawakita was not guilty of treason.

We turn now to the treaties between Japan and the United States.

By January 1, 1946, the Military Commissions in charge of the Supreme Commander, General Douglas MacArthur, had been formed in Japan. Other Japanese were tried

and punished by the Commission. At no time was Kawakita molested, or tried, or punished. Whatever information this case was based upon was then in the possession of the American forces. Sergeant Montgomery was in fact a counter intelligence agent or American spy, an investigator for the army (R. 350). He had full knowledge of everything that went on in the camp. Major Martin had taken over the camp; Lt. Bleich, the doctor in charge, had kept a diary for a long time. Kawakita's name nowhere appears in the diary. And Kawakita had many witnesses and records immediately available to defend.

Major Martin had used Kawakita as his chief aide in interpreting between natives and the American in arranging for telephone service for the camp, on taking Americans on excursion trips, arranging a prophylactic station at the police station for the American soldiers (after their visits to Japanese girls) and he and he alone of all of the three interpreters was used to arrange a banquet for American officers, and be present. He also arranged for their departure. He arranged for their trains, was at the depot at the time and assisted in getting all of the baggage aboard when the men left, and had in every way assisted the Americans in the camp. He was the last man they saw when they departed. Afterwards, he reported to the American Consul, who has the power of arrest, in making his application for passport, and went to the American Consulate on several occasions. He also reported to the Eighth Army in seeking transportation back to the United States, and went there many times. At no time was it suggested that he be arrested or charged with any offense.

The case here, then, developed only after a former American prisoner of war, William Bruce, had bumped into the defendant in Sears Roebuck & Co. store in Los Angeles, who had prevented him, when he was a prisoner of war at Camp Oeyama, according to his testimony, from eat-

ing a nut. It was here that "treason" was born. It took seven months thereafter to create and manufacture a case which might appeal to former prisoners of war and bring about a prosecution in the United States where the defendant had no witnesses able to clear him.

If the defendant was guilty of treason, it was known to the officers and men while they were in Japan and before they left Japan, and the defendant was entitled to a speedy trial, either by the American Consul or by court martial or in the American Military Commission.

Sixth Amendment U. S. Constitution.

In the case of *Harris* v. *The Municipal Court*, 209 Cal. 41, the Supreme Court of California held that the failure of the State to bring a number of defendants to trial whom it had named only as John Does, although their names were available, was a denial of speedy trial. By statute, the California Penal Code holds that a person who is not brought to trial within sixty days after indictment, has been denied speedy trial. In the Municipal Court, within 30 days.

In the present case, the defendant was actually reporting and actually "found" in Japan in Camp Oeyama, at the time the Americans took it over. He was there at all times after they took it over. He was available to the American *Consulate*, which has court jurisdiction over Americans (Title 22, Sec. 141-5); to the Eighth Army of Occupation; to the Military Commission and to all authorities at all times. He not only did not hide, he actually went to their offices on several occasions.

It is respectfully submitted, therefore, that he was denied speedy trial guaranteed by the Sixth Amendment to the Constitution of the United States, which provides as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a *speedy* and public trial."

Japan was also the "vicinage" with witnesses all available there.

(B) He Was Also "Found" in Japan Within the Meaning of Title 28, Section 102 (1946 Edition) and the United States District Court in Los Angeles, California, Therefore Had No Jurisdiction.

Ex parte Bollman, 4 Cranch. 75.

Having reported to the American Consulate numerous times, and to the Army of Occupation frequently, to hold he was "found" two years later under the facts of this case is to fly in the face of facts, and truth.

IV

At the time of the acts here involved petitioner did not owe allegiance to the United States.

A

To Hold Otherwise Would Be to Make as Naught the Right of Expatriation Which the Law of This Land Holds as Fundamental

The petitioner, Tomoya Kawakita, unmistakably divested himself of American citizenship after reaching his majority while in Japan. He omitted renewing his passport. He made no effort to return to the United States on an exchange ship. He changed his residence address to Japan. He entered his name *formally* in the family Koseki, which reaffirmed an allegiance which already existed (Deposition of the Attorney General of Japan), (Defendant's Exhibit A). He went to work in a concern that was under the control of the Japanese government, and operated by the Military Branch of the Government in a position that required Japanese nationality. He bowed to the Emperor daily and expressed his allegiance to the Emperor, which was required

of all this company's employees. He was given a choice by the police which controlled immigration in Japan to elect between American nationality and Japanese; he elected Japanese nationality and it was recognized by the Japanese Government by having his name removed from the *alien* registration at the local police station. Thereafter he was no longer required to carry an alien registration card, and was permitted the entire freedom of Japan. He also was given a *Japanese* passport to China, and traveled to China and remained in China on a Japanese—and not an American—passport.

Each and all of these acts constituted an election, after reaching his majority, to be solely a Japanese citizen, and to divest himself of American citizenship. (Subdivision (a) Title 801, Nationality Act.)

Nevertheless, the trial court below and the Court of Appeals affirmed the doctrine that even though by these acts he *elected* Japanese nationality, the United States of America still had a hold on him by reason of his birth in the United States. This has been the doctrine of the totalitarian countries, but not that of the United States.

Since 1859, the United States has recognized the right of expatriation. This was first expressed in an opinion of Attorney General Black, OP 89 HOR, 1859 and was incorporated as *the American principle* in the Act adopted July 27, 1868 when it declared:

> "The right of expatriation is a natural and inherent right of all people, indispensible to the enjoyment of life, liberty, and the pursuit of happiness,"

and forbade

> "any declaration, instruction, opinion, order or decision of any officer of the United States which denies, restricts, impairs or questions the right of expatriation, is hereby declared inconsistant with the fundamental principles of this government." (Revised Statutes,

Section 1999, 15 Stat. L. 223, 224, Title 8, Section 800, U. S. Code.)

The decisions of the court below are in conflict with this fundamental principle of American Government, and in accord with the principles attempted to be enforced from time to time by Germany, Japan when it was a totalitarian government, and Russia.

In *Yasui* v. *United States*, 48 F. Supp. 40, (revd. on other grounds, 320 U. S. 115) the court said:

> "The election is a mental act. The choice which exists in the mind of a person is exemplified by acts. The intention, however, to make an election can be discovered by a tribunal as can criminal intent, knowledge or any other mental state. . . . such a mental state may be found in a criminal case contrary to the sworn evidence, protestations and declarations of a defendant."

The Trial Court below and the Court of Appeals affirmed and held that the election of Kawakita was of no significance, as he was already under the law of Japan, a Japanese citizen. This was erroneous, since his election was to be solely Japanese, and thus to divest himself of his American citizenship.

His subsequent conduct after the war in going to the American Consulate; there being told when he inquired as to how he could regain American citizenship, that he had never lost it and that he could return to the United States, was but the declaration of a Clerk in an administrative capacity and did not re-invest him with the citizenship already lost—but only served, by a then administrative ruling, to give him the right to return to the United States without again becoming naturalized, and to overcome the presumption of expatriation as required by statute and regulations.

Such a procedure showed merely that the Administrative Department of the United States thought that during the

period charged in this indictment he had only presumptively expatriated himself, and that it was only necessary to undergo another administrative proceeding through the Consulate in order to re-establish his right to come into the United States. Had the United States desired it could have attacked this procedure in court. (Title 8, Section 903, U. S. Code.)

An indispensible element of the crime of Treason is that the accused must, at the time of the commission of the overt acts, owe allegiance to the United States.[27] Even if only presumptively expatriated he still would not during this period owe allegiance to the United States.

Petitioner's manifestation of allegiance for Japan and not for the United States resulted in his expatriation.

In the *Yasui* case, *supra,* 48 Fed. Supp. 40, Judge Fee spoke of the right of election and the determination of that issue by the outward manifestation of a state of mind. This theory is confirmed by the legislative history of Sec. 401 of the Nationality Act (8 U. S. C. 801).

Thus the President's Cabinet Committee reported to Congress that the provisions of the proposed Nationality Act concerning loss of citizenship were:

> "intended to deprive persons of American nationality when such persons, by their own acts, or inaction show that their real attachment is to the foreign country and not to the United States."

(The foregoing is quoted in *Dos Reis* v. *Nicolls,* 161 Fed. (2) 860 at 863.)

And further, quotes the *Dos Reis* case from the President's Cabinet Committee report concerning 8 U. S. C. 801 (c):

> "This provision is based upon the theory that an American national who, after reaching the age of majority

[27] Old 18 USC 1; New 18 USC 2381.

(see proviso (2) to this section, infra) voluntarily enters, or continues to serve in, the army of a foreign state, *thus offering* his all in support of such state, should be deemed to have transferred his allegiance to it."

This principle is carried out in *Doreau* v. *Marshall*, 170 Fed. (2d) 721, 724 where the court talked about "manifesting (his) intention of renouncing his country."

And Representative Rees during the course of debate in Congress made it clear that what the House Committee in recommending changes in nationality legislation had in mind was to deal with those persons "who have no real attachment to the United States" and to allow them (or compel them, as the case may be) to expatriate themselves. (Congressional Record, Vol. 86, 76th Cong. 3d Session, p. 1, 1948).

In *Comitis* v. *Parkerson*, (CC La. 1893), 56 Fed. 566, 558, the court recognized that a citizen of the United States could expatriate himself by a "manifestation of the purpose to expatriate himself."

And so, it is respectfully submitted, when petitioner acted as he did in Japan, he did all he could to shift, and to manifest his desire and intent to shift, his allegiance from this country to Japan. In other words, he desired to and did expatriate himself in a manner or manners recognized by this country as being expatriating acts. If the right of expatriation means anything at all, it must mean that when one, like petitioner intends to expatriate himself and so acts in conformity therewith, his expatriation has been effected. That is to say, he has transferred his allegiance.

As will be shown, petitioner, at the time involved, did not owe allegiance, primarily because he was no longer a citizen of the United States, either actually or presumptively, or, if this argument be rejected and it is felt that he was a United States citizen, because of his Japanese citizenship

at the time, his domicile in Japan and the inability of this government to give protection, he did not owe allegiance to the United States.

B

Petitioner at the Time Involved Was Not a Citizen of the United States

As the lower court correctly points out (190 F. (2d) at 513), litigation on the question of expatriation usually occurs in a different setting. Usually it is the "citizen" who claims he did not expatriate himself and it is the government who claims otherwise. However, because the contentions are reversed here does not mean that the true perspective of this Nation's view toward expatriation should be lost.

The lower court erred in assuming that the question of whether or not Petitioner was a United States citizen was a question of fact for the jury to decide. Citizenship is a status. By its very nature, it is a question of law. If, in its holding, the lower court meant, as it apparently did, that there was sufficient evidence justifying the jury finding that Petitioner did not perform the acts of expatriation voluntarily, then, it is respectfully submitted, the court totally misconceived the *right* of expatriation as set forth in 8 U. S. C. 800, and in so doing, acted contrary to the whole theory of that Section. This is so, because there is *no* conflict in the evidence as to what this petitioner did with respect to his actions as a Japanese and not an American.

Contrary to the old common law concepts and present day totalitarian ideologies, this nation has decreed that it gives its consent to its citizens expatriating themselves. This is not to say that the United States *had* to so give its consent, but having done so by legislation (8 U. S. C. 800, 801, 802) there is little logic in a holding that *despite the citizen's having done all that the statutes require,* nevertheless in a

given case, *the court will say that there has been no consent.* It is to be remembered that the "right" to expatriation is the citizen's, *not* the government's. And, since the opinion of the Attorney General in 1859, it has been our national policy. We have so declared in 8 U. S. C. 800. It is ill founded, therefore, to say, as did the lower court, that though the right hand (the Congress) has given, the left hand (the Judiciary) taketh away.

Although much was made in the courts and briefs below on the question of dual citizenship at the time of petitioner's birth, it matters little whether this was so or not. The point is that *at the time of the acts here involved,* petitioner was clearly a citizen of Japan. The court so instructed the jury, and, as we will show, he had expatriated himself from American citizenship under the statutes of the United States in a number of ways.

(1)

Petitioner Expatriated Himself Under 8 U. S. C. 801 (a) by Obtaining Naturalization in Japan, in March 1943

The facts on this issue are undisputed.

Prior to March 2 or 3, 1943, petitioner was registered with the Japanese police, *not* as a Japanese, but as an American and as an *alien* with his residence as Calexico, California (R. 4501, Exh. CR; R. 3866, et seq.). On said March 2 or 3, 1943, he was told by the police that he would have to elect as to whether he was going to be Japanese or American (R. 4051). Thereupon, in order to be and to be treated as a Japanese and *not* as an American, he caused his name to be entered in the family register or Koseki (R. 4385). This was a formal procedure wherein the registrar at the City Hall asked petitioner if he desired to have his name entered as a Japanese subject. To which petitioner replied "Yes"; and he took the family seal and stamped it on the record (R. 4385).

Up to this moment Kawakita had been considered by the *Japanese* as an American, an *alien* and not as a Japanese.

From this moment he was considered by the Japanese as having done all that was required of him to be a Japanese. Of course, the mere fact that the Japanese chose, under their laws to treat petitioner as a Japanese does not mean that the United States could not also treat him as an American. However, by legislation, cognizant of the confusion and uncertainty which results from a person having two nationalities, our government has said that when a person performs those acts in a foreign country which thereafter cause him to be treated as being a national of the foreign country where formerly he was recognized as a national of the United States, *this country* no longer regards him as a national of ours and he has lost his United States citizenship. (8 U. S. C. 801, et seq.) Having said that, the United States is in no position to say it did not mean what it said simply because *later* the person does acts disliked by the United States.[28]

Thereafter, of course, the record is clear that petitioner comported himself as a Japanese and not as an American—and all before the alleged treasonable acts took place. For example, he took a certified copy of the entry of his name in the family Koseki to the police station and his name was removed as an alien enemy; (R. 4053) he changed his nationality at Meiji University from American to Japanese and his address from Calexico, California to Suzuka, Meye-Ken, Japan (Exhibit 4); he took a certified copy of the Ko-

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[28] Not involved in this case is a question of a United States citizen *for treasonable purposes* attempting to expatriate himself so that a question akin to fraud may be present. The facts are clear here that *at the time* petitioner became a Japanese, his sole purpose was to *be* a Japanese and not an American. The acts complained of in the indictment occurred about two years later.

seki entry to the Oeyama Camp, (the Nippon Yakin Kaisha Company) in order to obtain a job which, had he not had such entry, he could not have obtained. (R. 477, 478); he went to China on a Japanese passport (R. 4059); upon his return he received his labor draft papers, and did not claim that as an American he need not (Exhibits Z & W); furthermore, he bowed to the East each morning and solemnly prayed for his Emperor's health and happiness, and for the victories for His Majesty's armed forces abroad. (R. 3628; 4103). Such conduct only serves to emphasize and reaffirm the act of expatriation, which petitioner had effected by himself obtaining the entry of his name in the family Koseki.

As has been pointed out, prior to the entry in the Koseki, petitioner was not, in the eyes of the Japanese, a Japanese; subsequent thereto, he was. That is, it was only after the formal entry that, according to Japanese law, petitioner was a Japanese, and thereafter had all the rights and duties of a Japanese citizen. This fact was undisputed.

This being so, no other nation has the right to say that this was not so. For it is clearly the law, that whether a person is or is not a national of a particular land is determined by the law of that land and no other.

Perkins v. *Elg*, 307 U. S. 325, 329;
See also *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 352.

The treatment accorded petitioner after, as contrasted with his treatment before, the Koseki entry is sufficient to demonstrate the change in petitioner's status.

It is submitted, therefore, that in accordance with the language, policy and spirit of 8 U.S.C. 800, and in accordance with the language of 8 U.S.C. 801(a), petitioner became naturalized in a foreign State on his own application

and therefore expatriated himself and therefore was not a United States citizen at the time the acts charged were allegedly committed.[29]

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[29] Petitioner submits that under the peculiar circumstances pertaining in Japan wherein a person born of Japanese parents in the United States, prior to December 1, 1924, may technically be considered to be a Japanese national and therefore a person of "dual nationality", nevertheless, since in Japan itself and in accordance with Japanese law and custom such a person is not treated as a Japanese if his name has not formally been entered in the family Koseki at the City Hall (R. 4053), that the formal entry in the Koseki at the behest of petitioner, amounts or is tantamount to the naturalization referred to in 8 U.S.C. 801(a). Petitioner recognizes, however, that there may be some logic to the argument that one cannot be "naturalized" in a country of which he is already a citizen; but if his citizenship is in doubt, he may make it certain by such formal procedure as may be set up. So here, during the war, the place of birth of many Americans was in doubt. We set up means of establishing it by the testimony of two witnesses.

On the other hand, petitioner suggests that the assumption that because petitioner was born before December 1, 1924, he continued to remain a "dual citizen" after that date (the time Sections 2 and 3 of Article 20 became effective) may not be correct. It may well be that the assumption that all American-born Japanese born prior to December 1, 1924 continued with dual citizenship after that date may be too general and does not cover the case at bar. The reason is seen from a simple reading of the Section. The first paragraph of Section 2 of Article 20 (R. 4287, Exh. C2) provides that Japanese born in a foreign country designated by Imperial Ordinance (the United States is one) loses his Japanese citizenship retroactively from his birth if he does not express his intention of retaining Japanese nationality. Petitioner here did nothing. Thus the conclusion that by the passage of the 1924 amendment, petitioner, having done nothing to retain his Japanese citizenship, he may have lost his Japanese citizenship retroactively from his birth. Hence, he was only recognized as a United States citizen when, in 1943, he had his name entered in the Koseki. Accordingly, on this theory, the Koseki entry clearly amounted to naturalization within the meaning of 8 U.S.C. 801(a), because up to that time he had recognition only of United States citizenship. The view that petitioner, prior to the Koseki entry, did not have Japanese or recognition of Japanese nationality is bolstered by the interpretation as to Kawakita's status by the Japanese themselves. Such interpretation is entitled, of course, to the greatest respect. (Gray v. Powell, 314 U.S. 402; Labor Board v. Hearst Publications, 322 U.S. 111.) And, is, indeed, binding on this Court (Perkins v. Elg, 307 U.S. 325, 329). In the first place, though every Japanese male national who reached the age of 20 was subject

(2)

Petitioner Expatriated Himself under 8 USC 801(b) by taking an Oath or Making an Affirmation or Other Formal Declaration of Allegiance to Japan.

Regardless of whether it is felt that petitioner's act in having his name entered in the family register amounted to naturalization or not, it should be amply clear that that act, at the least, was a formal declaration of allegiance to a foreign state.

This entry on the part of petitioner was the formalized procedure provided for and done pursuant to Japanese Law (Exhibit W). It can be considered as nothing other than the making of an affirmation or other formal declaration of allegiance to Japan. It will be remembered that the family register, pursuant to Japanese law, is kept by the Registrar, who was informed of petitioner's desire (R. 4385). In accordance with the procedure, the Registrar asked petitioner if he wanted his name entered in the family Koseki as a Japanese subject. To this petitioner replied "yes." Thereupon the Registrar formally entered petitioner's name on the record.

The testimony of the defendant is as follows: (R. 4051-3)

"Q. What was said by you and what was said by this officer?

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to the military draft, petitioner was not drafted. (R. 4052.) Secondly, his status with the police was that of a non-Japanese (R. 4051; Exh. CR; R. 3866, et seq.) until his name was entered in the Koseki. Thereafter he was drafted to work at the mine. He was no longer restricted in his travel. (R. 3874.) He was able to and did obtain a Japanese passport to go to China. (R. 4059.)

(Counsel for petitioner are indebted for this view to Mr. Shonan Kimura, of Los Angeles, a scholar on Japanese law and custom.

A. The officer first looked up my file, trying to see my name. He asked me if my name was ever registered in the family Koseki in Japan. I told him no.

Q. And then what did he say to that?

A. He said that "You must decide either to be an alien or a Japanese because at the present time one must owe allegiance to the country in which he is residing."

Q. What did you do after that? What did you say?

A. I asked the officer, "What shall I do to prefer my allegiance to Japan?"

Q. And what did he say?

A. And he said, "You could obtain Japanese nationality by having the head of the family Koseki to enter your name in the Japanese Koseki."

Q. And then what did you do after that? Did you go home?

A. Yes, sir.

Q. See your uncle?

A. Yes, sir.

Q. What happened there?

A. It was on about the 7th of March, 1943 when I went to Miye Prefecture from Tokyo. I told my uncle that I wanted to enter my name in the family Koseki, and my uncle told me that it is the best think to do because we are at war right now. Next morning I went with my uncle to Ishiyakuhi office of Suzuki city hall and he had my name entered in the family Koseki.

Q. And thereafter did you have your address changed in other places?

A. Yes, sir.

Q. Where did you have your address changed?

A. I returned to Tokyo and on about the 10th of March, 1943 I went to the Mejiro police station where I had previously registered as an alien.

Q. And what did you do there?

A. I submitted to the police officer my Taiho Kyoka-Sho and my Koseki Tohon.

Q. That first word that you used, that is not familiar to us.

A. Taiho Kyoka-Sho, certificate for aliens residing in Japan.

Q. Did you turn that in then? Did you turn that in?

A. Yes, sir; I submitted to him with my Koseki Tohon.

Q. Prior to that time had you been required to get permits to go from city to city?

A. Yes, sir.

Q. After that did anybody request you to get any permit?

A. No, sir. I had my name checked off." (R. 4051, 4052, 4053).

There is no dispute of fact as to this.

Certainly, this is complete compliance with the Statute. Particularly is this true in the light of the treatment subsequently afforded petitioner by the Japanese police and at his place of employment as a Japanese and not as an American—all based upon his act of entry in the family Koseki.

And, if logic and common sense were not sufficient to sustain this conclusion, the undisputed evidence in the case given ample corroboration.

Thus Yoshio Suzuki, the Attorney General of Japan testified in his deposition (Exhibit A) that the entry in the family Register is a "re-affirmation of an allegiance to Japan which already exists." What more is needed? If one re-affirms, he affirms again; that is, affirms one more time. In the nature of human experience, affirmations of allegiance are made oftimes more than once. Every time a United States citizen applies for a passport, or pledges allegiance to the flag, or accepts a public job, he makes a re-affirmation of his allegiance to the United States. Can it be logically

argued that one who thus re-affirms his allegiance to the United States does not thereby make a formal declaration of allegiance to this country? Why then a difference if done toward Japan?

There is further evidence in the record of this case supporting this view. The trial court, erroneously, it is submitted, rejected the testimony of the Mayor of Suzuki, the town wherein petitioner's family Koseki was kept, as to the nature of the Koseki entry. To suggest that the Mayor of the city is not qualified to testify as to so much a part of Japanese tradition, custom and law, as the family Koseki entry, is to disregard reality. The Mayor in his deposition (paragraphs 5-12, pg. 2 of Exhibit CO) testified that he was familiar with the laws relating to the family register. There is nothing in the deposition to contradict this. In order to know the law, one need not necessarily be a lawyer (Cf. the fact that 2 justices of the New Jersey Supreme Court are not lawyers) just as in order to know medicine, one need not necessarily be an M.D. (e.g. Pasteur). The question is whether *the* witness testifying knows. As to this, there could be no dispute that he did.

Mayor Sugimoto testified in his deposition that the entry in the family register "becomes a formal declaration that the member of the family so entered is a Japanese national." He answered 'yes' to the question as to whether such entry constitutes a formal declaration of Japanese nationality according to Japanese law and procedure. Other testimony by the Mayor is to the same effect, including (Par 12) the testimony that this entry gave to the entrant according to Japanese law and practice "all the rights and duties of Japanese nationality."

There is no dispute that the treatment of petitioner after, as contrasted with before, the entry was as day to night. The refusal to recognize the entry as coming within 8 U.S.C.

801(b) reduces the family entry system to mere air-waving. As has been seen, such is simply not the case. Furthermore, whether what petitioner did amounted to an affirmation of allegiance to Japan must be determined in accordance with Japanese law, practice and custom, and not in accordance with United States' ideas.

Perkins v. *Elg*, 307 U.S. 325, 329.

Moreover, petitioner on other occasions performed acts sufficient to comply with 8 U.S.C. 801(b).

For example, he traveled to China on a Japanese passport (R. 4059). Clearly this constituted a formal affirmation of allegiance to Japan, just as one traveling on an American passport thereby declares his allegiance to the United States.

Futhermore, while serving as interpreter at Camp Oeyama, maintained by the Japanese Government for prisoners of war, he, along with the military personnel of the camp, faced toward the East, bowed solemnly and prayed for his Emperor's health and happiness and for the victories for His Majesty's armed forces abroad. (R. 3628; 4103).

In the context of the position in which the Emperor stood prior to and during the war, there could scarcely be conceived a more formal declaration of allegiance to a foreign state. At that time the Emperor *was* the state.

Certainly these acts comply with the statute just as did the action in *U.S. ex rel DeCicco* v. *Longo*, 46 F. Supp., 170, 174:

> ". . . . His voluntary submission to military service . . . . must be considered as, in effect, the taking of an oath of allegiance (to Italy) . . ."

Petitioner Expatriated Himself under 8 USC 801(c) by Serving in the Armed Forces of Japan, he Having the Nationality of that Foreign State.

It is to be noted that 8 USC (801(c) has two provisos. One is *entering* the armed forces of a foreign state. The second is *serving in* the armed forces of a foreign state. Obviously, Congress was not just mouthing words; it clearly meant two different things. It is undisputed that petitioner did not enter the armed forces; that is, he did not actually wear a Japanese Army uniform. But, that he *served* in the Armed Forces is equally clear. Certainly one need not wear a uniform to serve in the armed forces and to be subject to military law.[30]

As the facts show, the duties of petitioner in the acts charged against him are all in relation to the prisoners of war in the camp operated by the military department of the Government of Japan for that purpose. Had petitioner been captured by the United States, he would have been entitled to be treated as a prisoner of war.[31]

The company for which he worked was a corporation engaged in defense work under the control of the army. (R. 4057, 4061). The company operated a nickel mine at Oeyama. (R. 4048). The prisoner of war camp was maintained by the Japanese Government, controlled by the Japanese military department and received its orders from it. (R. 3726). All orders were given by Lt. Hazama of the

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[30] Cf. Old 10 USC 1473 (d) (repealed by Act May 5, 1950, c. 169, S 14a, 64 Stat. 147) and Appendix 2, p. 413, Manual for Courts Martial, U. S. Government Printing Office, 1951.

[31] Article 3, Regulations of the Treaty of The Hague, Treaty Series No. 846, pg. 39, July 27, 1929:

"The armed forces of the belligerant parties may consist of combatants and noncombatants. In the case of capture by the enemy, both have a right to be treated as prisoners of war."

Japanese army. (R. 3727). Petitioner's duties were as interpreter for the prisoners of war and the Japanese military, (R. 473), not for any duties with the employees of the mine company. When he was instructed as to his duties, he was told that he was "to take orders from the camp authorities, which was the military authority." (R. 4055). On arrival at camp, he reported to the military commander, Lt. Hazanka (R. 4056) who also told him that he was to take orders from the Military authorities and that the place the prisoners of war were working was a military zone. (ibid) He was further instructed to act in a stern and military manner or he would be punished by the military authorities (R. 4057, 4105).

Of course, all the overt acts charged are with reference to orders of the military and the prisoners of war. Another interpreter, Meiji Fujizawa, was given a special permit *by the army* to perform his duties while he was obtaining his Japanese citizenship. (R. 4057).

Accordingly, it is submitted, that the expiration provisions of 8 USC 801(c) apply here, and that petitioner expatriated himself under them.

(4)

Petitioner Expatriated Himself under 8 USC 801(d) by Accepting and Performing the Duties of Employment Under the Government of Japan for which only Nationals of Japan were Eligible.

On this point the record is ever so clear.

He could not have been employed by the nickel mine company had he not been a National of Japan (R. 4386, 4049). No non-Japanese citizen could work in a defense plant (R. 4050).

In October, 1944, petitioner, by virtue of a law applicable only to Japanese nationals, was served with the draft work papers compelling him to work at the job to which he had

been assigned. (R. 488, Exhibits Z & W). At about the same time the company was drafted by the Government and became a government controlled company. (R. 4061). When petitioner tried to change his job, after Americans were brought to the camp, he was told by the company official that the company was under the control of the Government; that the company could not change positions or places of work, and that he was frozen in his job. (R. 4061). Petitioner's draft papers (Exhibits AB and AB-1 and Z) were to the same effect.

How much more, it may well be inquired, is necessary for petitioner to have complied with 8 USC 801(d)? He was certainly in employment *under* the government of Japan, in a position for which only nationals were eligible.

Cf. for example, the decision of this Court in *United States* v. *Pewee Coal Co.*, 95 L.Ed. (Adv. Op.) 550, and *United States* v. *United Mine Workers*, 330 U.S. 258. These cases demonstrate that petitioner was employed under the Japanese Government.

(5)

The Presumption of 8 USC 802 Applies

It has been demonstrated above that petitioner, pursuant to the permission granted him by this government, expatriated himself under the provisions of 8 U.S.C. 801(c) and (d), (as well as (a) and (b)). Accordingly, he having remained in Japan for more than six months, it is presumed, by virtue of 8 USC 802 that he did so expatriate himself.

Moreover, it is obvious that the proviso for overcoming the presumption is for the benefit of the citizen in the event *he* claims that he did not perfom the acts voluntarily. It is another example of the concern of our government that, in recognizing the right of expatriation it does not *impose* expatriation upon one who had not acted voluntarily.

It is submitted that the government has no right to de-

cree an overcoming of the presumption for its own purposes by the expatriation. Otherwise, the lofty declaration of 8 U.S.C. 800 comes to naught.

Moreover, it should seem clear that, in the light of the record in this case on the conduct of petitioner as a Japanese, the suggestion that the presumption of expatriation has been overcome is, to say the least, far fetched.[32] Compare, for example, *Zimmer* v. *Acheson*, 191 Fed (2d) 209 (CA 10) where the court held that the presumption had not been overcome, and *Mandoli* v. *Acheson*, (CA DC Jan. 10, 1952, 20 U.S. Law Week 2289).

(6)

Petitioner's Entire Course of Conduct in Japan was Inconsistent with American Citizenship.

Even aside from the specific statutory provisions above discussed, it is submitted that by his conduct petitioner had expatriated himself from United States citizenship. Just as it has been held that the 1907 Act (Act of Mar. 2, 1907, 34 Stat. 1228, Sec. 2; former 8 USC 17) did not provide the only way one could expatriate, for one thing because the declaration of R. S. 1999 (now 8 USC 800) was not repealed, so also must the same thing be held here.

See: *United States ex rel DeCicco* v. *Longo*,
40 F. Supp. 170, 174;
Attorney General v. *Ricketts*, 165 F (2d) 193, 195.

The declaration of 8 U.S.C. 808 does not militate against this argument if for no other reason than that R. S. 1999, now 8 USC 800, was not a part of the chapter there being

[32] The certificate by the consular official upon petitioner's return to the United States can be considered in the light of the facts later developed that at least at all times mentioned in the indictment the petitioner was presumptively not a citizen. A presumption is evidence which the jury or court is bound to follow. Especially is this so since the Immigration and Naturalization Regulations themselves (Sec. 315.9) under which the certificate issued provides that it only speaks "as of this date".

legislated. And, the instruction of the Court to the jury that 8 U.S.C. 801 was the only method of expatriation is therefore error.

* * * * * * *

It would seem manifest that if petitioner in *Savorgnan* v. *United States*, 338 U.S. 491 lost her United States citizenship, so also did petitioner here. The difference in the desires of the parties (as to whether the court should or should not find expatriation) should make no difference in law.

C

Even if a Citizen of the United States, Petitioner, At the Time Here Involved, did not owe Allegiance to the United States.

If it be felt that, despite the clear and unequivocal acts of petitioner in expatriating himself, his right of expatriation will not be recognized and that petitioner at the time of the acts here involved was still a citizen of the United States, nevertheless, it is submitted, he did not at the time owe allegiance to the United States, and therefore could be guilty of no treason. At another point we have discussed the fact that petitioner was at least presumptively expatriated and therefore owed no allegiance.

The situation of a person holding citizenship in more than one country is an unenviable one. If he acts consistent with the nationality of one country he runs the danger of being held to have committed treason against the other. (e.g. this case). Recognizing this dilemma and this disability, Congress passed the expatriation statutes to enable a clarification of status. But, even without a clarification and assuming a person of dual nationality, as does the discussion under this point, this government has nevertheless recognized the realities of the situation and has acted accordingly with relation to the allegiance such person owes.

It is plain logic that a government can only expect allegi-

ance if it in turn gives protection. This is reasonable and in the nature of things must be; otherwise there are only obligations without receipt in return of that for which the obligations were given. Accordingly, the State Department has ruled:

> "Allegiance is a political obligation between sovereign and citizen of a reciprocal character, involving obedience on the part of the citizen and *protection* on the part of the sovereign." (Italics added) (See 3 Hackworth, 271)

and again:

> "A person possessing the nationality of both the United States and a foreign country, who habitually resides in the territory of such foreign country and who is in fact, most closely connected with that country, should not expect to receive the protection of this Government while he is residing in such country . . ." (State Department Bulletin: Exh. DR)

and still again:

> ". . . While a person who had dual nationality resides in the United States, the right of the United States to his allegiance is paramount to the right of the other country of which he may be a citizen. Conversely, while a person who has dual allegiance is residing abroad in the country to which he owes allegiance is paramount to that of the United States . . . " (See 3 Hackworth 352 et seq.)

So strong is the fact of domicile in a land under the protection of the government of that land, that this Court has held that a *British subject* while in the United States *owed allegiance* to the United States and could be punished for *treason* against them.

Carlisle v. *United States*, 16 Wall (U.S. 147)

If that be so as to Carlisle in the United States it is ever so much more so as to petitioner in Japan, for he was not

merely domiciled there, but he was actually a citizen of Japan, and, under the weak facts of the *Carlisle* case, owed that country *complete* allegiance. Certainly, it is a physical as well as a psychological and mental impossibility for one to owe *at the same time,* allegiance to more than one nation.

But, aside from the force of the *Carlisle* case doctrine, the case at bar is much stronger. As to *Carlisle,* he could expect protection and support from his government. Not so petitioner. This government could not, was in no position to, and did not give any protection to petitioner under the facts prevailing at the time. The question, of course, is not why we gave no protection. The important thing is that that was the fact.

Therefore, the one half of the bargain which is the *sin quo non* in return for allegiance fell. Accordingly, the claim for allegiance *at the time* also fell.

cf. *Luria* v. *United States,* 231 U.S. 9, 28;
Wallace v. *Hermstad,* 44 Pall (8 Wright 492, 501).

* * * * * * * *

It is, of course, but natural and human, under the facts of this case—because petitioner did return to the United States *later* under a *later* claim of being an American citizen —to feel that the pound of flesh demanded by the government is justified. But it is hornbook law that a knave, merely because he is a knave, cannot be convicted of burglary. Under the law, as has been demonstrated, petitioner was either NOT a citizen of the United States at the time in issue; or, if he were, he did not, under the facts of this case, owe allegiance to the United States. Hence, he could not be guilty of the crime of Treason. (Chief Justice Marshall's admonition in *United States* v. *Burr,* 25 Fed. Cases No. 14693 and in *Ex Parte Bollman,* 4 Cranch (U.S.) 75, as to the requirement for the strict interpretation of the treason statute must ever be borne in mind.)

D

If Kawakita did not Expatriate Himself from United States Citizenship, and, despite his Actions to the Contrary, Remained a Citizen of Both Countries, he, being a Japanese Citizen residing in Japan, owed total allegiance to the Government of Japan at the Time of the Acts Here Involved and, therefore, could not be guilty of Treason.

In the entire period mentioned in the indictment, Kawakita was a *Japanese* citizen. This was conceded by the Government and by the trial court, and the jury was so instructed by the trial court. The State Department, in its Bulletin to its Consuls abroad, said that dual citizens residing in the country of their other citizenship owe *paramount allegiance to that country*, and this country and this country repeatedly refused to interfere with the drafting of American citizens who hold dual nationality and reside in the country of the other nationality. The Abstract of Passport Laws and Precedents (Code No. 1.6) on the subject of dual nationality, Dated May 19, 1941 and July 30, 1936; also the Bulletin of the State Department concerning dual nationality. (See Appendix to Petitioner's Opening Brief in the Court of Appeals, pgs. 15 & 16).

In this country, a Japanese subject, even if he elected Japanese nationality, but having dual citizenship, was required to register for Selective Service and to respond to Selective Service, and owed one hundred percent allegiance to the United States while residing within it. Japanese subjects were prosecuted for failure to register for Selective Service in this country, and these convictions were sustained.

Okamoto v. *United States*, 152 Fed (2d) 905;
Takeguma v. *United States*, 156 Fed. (2d) 437;
Fujii v. *United States*. 148 Fed. (2d) 298.

Since Kawakita resided in Japan, he was an alien enemy for all purposes.

In *LaMaars Executor* v. *Brown*, 92 U.S. 187, the court said:

> "In war, all residents of enemy country are enemies."

As said in *Carlisle* v. *United States*, 16 Wall. 147:

> "Being both a citizen and resident of Japan, he owed 100% allegiance to Japan, and did he disobey the Japanese he would be guilty of treason regardless of citizenship."

Carlisle v. *United States*, 16 Wall. 147
Radich v. *Hutchins*, 95 U.S. 210;
Leonhard v. *Eley*, 151 F. 2d 409 (C.C.A. 10);
Dejager v. *Attorney General of Natou* (A.C. 326);
Ex parte Quirin, 317 U.S. 1, 87 L.Ed. 3.

While residing in enemy territory, he was an alien enemy for all purposes. (*In re Territo*, 156 F. 2d 142; *Ex parte Quirin*, 317 U.S. 1; *Okamoto* v. *United States*, 152 F. 2d 905; *Takeguma* v. *United States*, 156 F. 2d 437; *Fujii* v. *United States*, 148 F. 2d 298; The War of 1812, *The Venus*, 8 Cranch 253; *The Frances*, 8 Cranch 335; *The Mary & Susan*, 1 Wheat. 46; Civil War, *Mrs. Alexander's Cotton*, 2 Wall. 404; *Miller* v. *United States*, 11 Wall. 268; *Ford* v. *Surget*, 97 U.S. 594; Spanish American War, *Juragua R. & Co.* v. *United States*, 212 U.S. 297; *Herrera* v. *United States*, 222 U.S. 558; World War I, *Kahn* v. *Garvan*, 263 Fed. 909 (S.D.N.Y.) *Taber* v. *United States*, 81 Court of Claims 142, Certiorari denied 296 U.S. 96; Present War, *In re Territo*, 156 F. 2d 142; *Exparte Quirin*, 317 U.S. 1, 87 L.Ed. 3).

Compare, also, this Court's determination as to the meaning of "paramount" rights in *United States* v. *California*, 332 U.S. 19. It was there held to mean "total" and to the exclusion of any rights the State of California might claim. Similarly must petitioner's duty of total allegiance to the Government of Japan be interpreted.

V

The Courts below have misinterpreted the law; the jury was erroneously instructed as to the law that the Nationality Act of 1940 expresses the sole grounds by which an American citizen may lose his American Nationality and that Section 801 of Title 8 expresses the exclusive means of losing American nationality.

That Section 801, Title 8, expresses the exclusive means of losing American nationality "under this chapter" does not express all of the exclusive means of losing American nationality.

The Trial Court, in an opinion on the Motion for a New Trial, expressed itself as possibly having committed error in so instructing the jury (96 F. Supp. 824 at 829), but stated that if it was an erroneous view of the law the error was harmless.[33] We respectfully submit that the jury, having been so instructed as a fundamental issue of the case regarding manner and means of losing American nationality, the error could not be harmless and this fundamental principle of law involved in this question should be resolved by this Honorable Court.

Screws v. *U. S.*, 320 U.S.

That the Trial Court was in error is shown by an examination of the history of Section 808 of the Nationality Act in Congress.

See also, *Mandoli* v. *Acheson*, (CA DC Jan. 10, 1952, 20 U.S. Law Week 2289).

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[33] "But even if it were an erroneous view of the law to tell the jury that 'the acts specified from time to time in § 401 are the sole and exclusive methods whereby a born American citizen can exercise the right of expatriation, and thus lose American nationality or citizenship,'—the error must in the circumstances of this case be deemed academic and harmless." (96 F. Supp. 829.)

The Court Gave No Instructions on Presumption and the Effect of Presumptive Expatriation, an Essential Element of the Case

The presumption of expatriation existed throughout the period in the indictment and since it was not overcome entitled the defendant to an acquittal, since under this presumption he owned no allegiance to the United States at that time. The jury was not instructed on this phase of the case.

The Court Erred in the Following Instruction:

> "Prior to the effective date of the Nationality Act of 1940, our law provided that any American citizen could expatriate himself by doing any voluntary act which evidenced an intent to renounce or abandon American nationality and allegiance; but our law further provided: 'That no American citizen shall be allowed to expatriate himself when this country is at war' (34 Stat. 1228).
>
> When the Nationality Act of 1940 became effective, those provisions of our law were repealed; and at all times since January 13, 1941, American citizens have been permitted to expatriate themselves during wartime, *but only in the manner provided by treaty or by the provisions of the Nationality Act of 1940.*" [Clk. Tr. p. 314 (11-F. (2).]

That portion of the instruction that provides that one may expatriate ones self *only* by treaty or in the manner set out in the Nationality Act of 1940 will limit expatriation to the ways specified by our laws and does not take into consideration all the means of expatriation provided by foreign laws.

It is our position that *any voluntary act expressing an intention* to abandon citizenship is sufficient to expatriate. This is the holding of Judge Fee in *United States* v. *Yasui*, 48 Fed. Supp. 40. We think, therefore, that the limitation which the court places on the means of expatriation was an incorrect statement of the law.

We filed a written motion (motion of opposition to statute) as construed and applied. [Clk. Tr. p. 106.]

In the legislative history of the Nationality Act of 1940 it is stated:

> "Sec. 406. The loss of nationality under this chapter shall result solely from the performance by a national of the acts or fulfillment of the conditions specified in this chapter.
>
> The object of this section is to make it clear beyond question that loss of nationality under a provision of chapter IV in no way depends upon a ruling of any officer of the United States, whether in the Foreign Service or in the service of one of the branches of the Government in the United States. The finding of such an officer in any case that a person has lost his American nationality because of an action by such person, including the establishment by a naturalized citizen of a permanent residence abroad or the maintenance by such a person of a continuous residence in a foreign state, as specified in section 402 of the code, would relate solely to the determination of the question presented to such officer for decision.
>
> It may be added that a person who shall have been denied recognition abroad as an American national by a diplomatic or consular officer of the United States, upon the ground that such person had expatriated himself by the performance of one of the acts specified in this chapter would not be without a legal remedy in case he should deem the ruling in his case unjustified and such ruling should be upheld by the Department of State. If such a person should be unable to take advantage of the provision of section 274D of the Judicial Code, as amended by the act of Congress of June 14, 1934 (48 Stat. pt. 1, 955), concerning declaratory judgments,[34] he might, upon arrival at a port of entry into the United States, and denial of entry as a national, resort to *habeas corpus* proceedings upon the grounds that he is en-

[34] Borchard, E., Declaratory Judgments.

titled to enter the United States as a national thereof. There seems to be no doubt as to the possibility of having a judicial decision in cases of this kind, if a person applying for admission to the United States as a national thereof submits substantial evidence of facts upon which his claim to American nationality may be based but is denied a fair hearing upon the facts, *Chin Yow* v. *United States* (1907), 208 U. S. 8, or the facts being admitted, he is denied admission upon the ground that under the law he has not American nationality, *Weedin* v. *Chin Bow* (1927), 274 U. S. 657.

The question of nationality may also be presented to a court for determination through *habeas corpus* proceedings in the case of a person who has previously entered the United States and is held for deportation from the United States as an alien but who claims the right to remain in the United States upon the ground that he is a national thereof (*Ng Fung Ho* (1921), 259 U. S. 276; *United States ex rel. Bilokumsky* v. *Tod* (1923), 263 U. S. 149. With reference to this subject see also Bouvé, C. L., The Exclusion and Expulsion of Aliens in the United States, Ch. IV, Judicial Review of Administrative Decisions; Clark, J. P., Deportation of Aliens ffom the United States to Europe, Ch. VIII, Administrative Standards and Methods, Judicial Review, pp. 312-322; Cook and Hagerty, Immigration Laws of the United States, sec. 228, The Writ of Habeas Corpus; Willoughby on the Constitution (2d), vol. 1, p. 325, vol. 3, p. 1668; Freund, E., Administrative Powers over Person and Property, Ch. XIII; Dickinson, J., Administrative Justice and the Supremacy of Law, Ch. III).

Some of the most important decisions of the courts in this country concerning nationality have been obtained through *habeas corpus* proceedings. (See for example, *United States* v. *Wong Kim Ark* (1898), 169 U. S. 649; *Weedin* v. *Chin Bow* (1927), 274 U. S. 657; *Camardo* v. *Tillinghast*, 29 F. (2d) 527.) In cases brought before the courts on petition for *habeas*

corpus the burden is ordinarily upon the Government to prove alienage (*Bilokumsky* v. *Tod, supra*)."

What we have said with reference to the legislative history of Section 808 of the Nationality Act would seem to dispose of the court's error.

The Court Erred in Construing the Nationality Act of 1940 as the Exclusive Ways of Losing One's Nationality. The Act so Construed and Applied Is Unconstitutional.

(a) *The Court Erred in Holding that the Nationality Act of 1940 Was the Exculsive Way in Which One Might Expatriate One's Self, or That Congress Had the Power to Limit the Natural Right of Expatriation.*

Congress by an Act adopted July 27, 1868, declared that:

"The right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness;"

and prescribed that:

"any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation, is hereby declared inconsistent with the fundamental principles of this Government."

Rev. Stat. Sec. 1999, 15 Stat. L. 223, 224, Title 8, Sec. 800;

This section has never been repealed or modified. It must be presumed that the Congress, in passing the Nationality Act of 1940, did not by its provisions intend to repeal or modify Section 800, or 15 Statutes at Large 223, 224, which is an expression of an existing policy inherent in our people, and was expressed July 27, 1868

and continued in all our national and international relationships since that date.

Any attempt to limit this policy, even by the Congress, is an impairment of a natural and inherent right of all people to the enjoyment of life, liberty, and the pursuit of happiness.

Any other policy is the policy of totalitarian government. It is the policy which Germany, Japan and Russia sought to impose upon their citizens who came to the United States.

The rulings of the trial court throughout this case, in holding that Kawakita necessarily was a citizen of the United States at all times in spite of his having registered his name in the Family Koseki, despite the fact that Japan recognized him as no longer an alien but one of its own subjects, and despite his having been employed in a position where only Japanese Nationals would be employed—is the ruling of the totalitarian governments, which we renounced in 1868, and by treaty with various countries, and by expressions which our State Department policies have constantly reiterated. (See Lawrences Wheaton, 925; Warton's Conflict of Laws, Sec. 5; Senate Ex. Doc. C. 38, 36 Congress, First Session, page 153; Ex. Doc. 91, 33 Congress, First Session; Mr. Jefferson to Mr. Manard, June 12, 1817; 7 Jeff Works 73; 2 John Adams Works 370; 7 John Adams Works 174; 9 John Adams Works 313, 314, 321; 10 John Adams Works 282.)

Mr. Fish, Secretary of State, wrote a letter to Mr. Washburne, June 28, 1873, in which he said:

> "It seems to this Department that the individual right of expatriation, which was thus referred to by Chief-Justice Marshall, is recognized by that clause of the Fourteenth Amendment to the Constitution

which makes *subjection to the jurisdiction* of the United States an element of citizenship. This conclusion is strengthened by the simultaneous action of Congress."

President Grant, in his Fifth Annual Message to Congress, 1873, said:

> **"We have agreed that residence in a foreign land, without intent to return, shall of itself work expatriation. We have agreed in some instances upon the length of time necessary for such continued residence to work a presumption of such intent."**

And, so while the Nationality Act of 1940 determines what acts are to be taken as evidence of such expatriation, it cannot exclude any other method by which one expresses an intent to reside in a foreign land without intent to return and to be a citizen of that country, and to express it in the way that country provides. This principle is established in International Law (Santissima Trinidad, 7 Wheat. 283; *Portier* v. *LeRoy*, 1 Yeates (Penn.) 371; *Jansen* v. *Vrow Christina Magdalena*, Bee: Adm. 11, 23; *sub nom. Talbot* v. *Jansen*, 3 Dall. 383; and see *United States* v. *Yasui*, 48 Fed. 40).

The Court Erred in the Instructions It Gave

The Court Erred in Giving the Following Instruction:

The court instructed the jury:

> "In order then to be relieved of the *duty of allegiance* imposed by American citizenship, one must do some voluntary act of renunciation or abandonment of American nationality and allegiance. And it is the policy of our law to permit free exercise of the right of expatriation by all American citizens everywhere." [Clk. Tr. p. 312.] (11-F.) (Emphasis ours.)

This instruction omits consideration of one relieved of the duty of allegiance by reason of presumptive expatriation, or presumptive non-citizenship. Also of rights of a dual citizen residing abroad. It is the position of the appellant that in order to be relieved of the duty of allegiance imposed by American citizenship, he may be either actively expatriated or *presumptively expatriated.* To be presumptively expatriated, one does not have to do some voluntary act of renunciation or abandonment of American nationality and allegiance. He is also relieved if he is a dual citizen residing in the country of his other citizenship.

* * * * * * * * *

Errors in Instructions Given

The Court Erred in the Following Instructions Given:

The Court gave the following instructions:

"It is stipulated that the defendant's parents were born in Japan, and by reason thereof have always been Japanese nationals or subjects owing allegiance to Japan.

According to the law of Japan, the defendant himself, by reason of his Japanese parentage, was from birth a Japanese national or subject owing allegiance to Japan.

This conflict in the laws of the two countries gives rise to what is sometimes called 'dual' nationality or citizenship; which means, as applied to this case, that the defendant became an American citizen upon birth, according to our law, because born in the United States; and also became a Japanese national upon birth, according to Japanese law, because of his Japanese parentage.

Under our law, any American citizen of alien parentage may, on becoming of age, renounce his Ameri-

can citizenship and thus become a citizen of only the country of his parents.

The question for you to determine on this phase of the case from all the evidence is whether or not at any time prior to or during the period specified in the indictment, the defendant did renounce or abandon his American citizenship. . . .

Under our law an American citizen cannot owe 'permanent allegiance' to more than one country at any given time. That is to say, it is legally impossible for any American citizen to *owe conflicting allegiance to any other country* so long as he or she remains a citizen of the United States." [Rep. Tr. pp. 5505-5506.]

This is an incorrect statement of the law and comes under our contention made heretofore, that a dual citizen residing in the country of one of his citizenships and presumptively expatriated from the citizenship of the United States under the circumstances of this case owed 100% allegiance to Japan. This is so because all he had, as far as the United States was concerned, was a presumptively *expatriated* citizenship in the United States. He had an actual Japanese citizenship and was residing in Japan. The court's instruction that it was legally impossible for any American citizen to owe conflicting allegiance to any other country so long as he or she remains a citizen of the United States was inconsistent and misleading to the jury. He at no time defined the liability of a presumptively expatriated citizen, one of the principal issues in the case (*Screws* v. *United States*, 89 L. ed. 1495, 325 U. S. 91; *Corson* v. *United States*, 147 F. 2d 437) and erroneously defined the duty of allegiance of a dual citizen.

A presumptively expatriated citizen of the United States still remains a citizen of the United States although dur-

ing that presumptive period of expatriation his allegiance to the United States is in a state of suspense. Likewise a dual citizen residing in the other country of his citizenship and receiving protection from it, owes allegiance to that country. (*Perkins* v. *Elg*, 307 U. S. 325; *Carlisle* v. *U. S.*; *Savorgnan* v. *U. S.*, 94 L. Ed. (Adv. 203).

2. Likewise, the court, along similar line, erred in its instruction on page 5517 of the Reporter's Transcripts, lines 9 to 14, as follows:

> "As stated before, the defendant was at liberty during his stay in Japan to renounce or abandon his American citizenship and with it all duty of allegiance to the United States. But unless and until he did so, the defendant owed *allegiance* under our law to his native country, the United States."

Again we state that this was an erroneous instruction, since the defendant was a Japanese citizen owing allegiance, therefore, to Japan and was presumptively expatriated under the Statutes of the United States and did not owe allegiance under our law to his native country *the United States* during that period.

4. The court erred in the following instructions given as to the overt acts:

> "While two or more witnesses must testify to the same overt act, it is not required of course that their testimony be identical. Nor is it required that each witness testify to the whole of the act, since different witnesses may testify to different parts of the act. What is required is that, in order to establish an overt act of treason, the minimum proof necessary is that direct evidence of the overt act be given through the testimony of at least two witnesses, and that the jury be convinced beyond a reasonable doubt of the truth of such testimony.
>
> Direct evidence of any overt act charged in this case

would necessarily consist of the testimony of eye witnesses who saw and heard the act done—saw the movement and heard the sound, if any, comprising the act. So the constitutional requirement is met only when, after considering the testimony given by all witnesses who testified as to an alleged overt act, the jury finds that the whole of such overt act—each movement and sound, if any, comprising the alleged act—is established as charged in the indictment by the testimony of at least two witnesses.

In order to convict the defendant of the crime of treason, it is not necessary that the prosecution prove every overt act charged. But it is essential that at least one of the overt acts charged in the indictment and remaining to be submitted for your consideration be proved by the direct testimony of *at least two witnesses*, and be so proved in its entirety as alleged in the indictment.

If you find that the prosecution has failed to prove beyond a reasonable doubt the commission by the defendant of at least one of the overt acts in its entirety as charged in the indictment by 'the testimony of two witnesses to the same overt act,' you must acquit the defendant.

On the other hand, if you should find from the evidence beyond a reasonable doubt that, while owing allegiance to the United States and while adhering to the enemies of the United States, the defendant did commit one or more of the overt acts alleged, and that such act or acts have been proved in entirety as charged in the indictment, by the 'testimony of two witnesses to the same overt act,' it would be your duty then to consider the fourth essential element of the charge." [Rep. Tr. p. 5521, line 23, to p. 5524, line 9.]

It is respectfully submitted that the *two-witness rule* is not correctly given in this instruction. Two witnesses are necessary to the overt acts, but the two witnesses, if in segments, must be sufficient to establish the precise segment of the overt act. Thus, if one witness testifies to a

part of an overt act and another witness testifies to another part of the same overt act, there are not two direct witnesses to the same overt act if the testimony does not establish the whole overt act and the instruction is therefore incorrectly given.

United States v. *Robinson*, 259 Fed. 685 690;
United States v. *Haupt*, 330 U. S. 631;
Cramer v. *United States*, 325 U. S. 1.

As Wigmore states in Wigmore Op. Cit., Note 71, Sec. 2036, pages 263, 264:

> "The object of the rule requiring two witnesses in treason is plain enough. It is as Sir William Blackstone said to 'secure the subject from being sacrificed to fictitious conspiracies, which have been the engine of profligate and crafty politicians in all ages.'"

5. The Court erred in the following instruction:

> "Article III, section 2 of the Constitution of the United States provides that: 'The Trial of all Crimes . . . shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.'
>
> Pursuant to the power thus conferred by the Constitution, the Congress in 1790 enacted in substance what is today Section 102 of Title 28 of the United States Code, which provides that: 'The trial of all offenses committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district where the offender is found, or into which he is first brought.'"

It is the position of the appellant that in this offense that when Japan was conquered it became a part of the territory of the United States and was triable in Japan, either by a court martial or by military commission

(Winthrop Laws of War, Army Doc. 1001, page 778) or before the American Consulate. (Title 22, Secs. 141-5 and treaties with Japan (*supra*), and Appendix E.) That is the place where the witnesses were present and if any treason had been committed and was concealed by any of the Americans, or anyone attached to the case, it was *misprision* of treason in violation of Title 18, Section 3, U. S. Codes.

Congress did not intend these cases to be brought to some district in the United States where it was available to try the accused in a territory of the United States governed by the United States officials and subject to court martial or other procedure and proceedings. The defendant was not found in the United States but was in Japan; had reported to the military authorities, and was under the direct supervision and control of the American Army, even at the railroad station before he left. To state that he was "found in the United States" more than a year later when some former prisoner of war saw him in the United States is to belie the fact of this case and to stultify the law.

The Court Erred in Refusing the Following Proposed Defendant's Instructions

"Defendant's Instruction No. 45:

You are instructed that the law recognizes dual-citizenship; that is to say, that when a person born in the United States of Japanese parents, who cannot themselves become citizens of the United States and remain Japanese citizens, that the children are dual-citizens." [Clk. Tr. p. 153.]

"Defendant's Instruction No. 46:

You are instructed that where a person is a citizen of two countries he owes paramount allegiance to the country of his residence and would even be guilty of the crime of treason if he was disloyal to that country. Therefore, you must find from the evidence in this case

to which country Tomoya Kawakita owed paramount allegiance, and if you find that he owed such paramount allegiance to Japan at the time of the offenses charged in the indictment you must find accordingly, and acquit him." [Clk. Tr. p. 154.]

"Defendant's Instruction No. 45:

A person born in one country of nationals of another, who acquire the nationality of the former by reason of the place of birth and that of the latter by reason of the nationality of the parents is in possession of what in law is called dual citizenship. Dual citizenship is not a theory or doctrine but is the unavoidable result of the conflicting laws of different countries. Under the American law of nationality, which is derived from the English law, American nationality is based primarily upon the fact of birth within American territory and jurisdiction, whereas under Japanese law as it applies to this defendant, he acquired Japanese nationality through the birth of his parents in Japan.

Where one possesses a dual nationality, his paramount duties and loyalty are to the nation of his residence whether permanent or temporary. He owes allegiance to that country in which he is residing and which is given the shelter and protection of its own land and its own laws. He must obey the laws, rules and regulations of that country and where he has a duty of election he must elect to show that allegiance to the country of his residence. In time of war he is deemed by the laws of war and the laws of nations, as well as by the laws of the United States, to be an enemy for all purposes while he resides in that country, and since war suspends the ability of the country with which that nation is at war to give him any of the protection of citizenship, whatever rights of citizenship he has in the country of his non-residence are during the period of such war suspended." [Clk. Tr. p. 157.]

It was error to refuse this instruction (*Carlisle v. United States*):

"Defendant's Instruction No. 51:

You are instructed that the term 'Japanese subject' means any person who owes allegiance to the Emperor of Japan or to the Japanese Government." [Clk. Tr. p. 159.]

This was highly important in view of court's instruction that that one could owe allegiance to only one country at one time.

Our other reasons are presented in the portions of the brief heretofore devoted to citizenship.

The Court Erred in Refusing the Following Numbered Instructions of the Defendant, Which We Refer to by Reference in the Clerk's Transcript:

We call the court's attention to three instructions. One of these was Proposed Defendant's Instruction No. 41 at page 149 and Proposed Defendant's Instruction No. 42 at page 150.

Particularly these relate to the burden of proof upon the Government to prove Kawakita's actual citizenship at the very time named in the indictment, to-wit, between August 8, 1944 and August 24, 1945, that Kawakita was actually a citizen of the United States and not a presumptively expatriated citizen.

Two other instructions which we offered, and which the court declined to give, we deem prejudically erroneous.

We offered instruction No. 61, Clerk's Transcript 172, as follows:

"You are instructed that where a defendant asserts that he was at another place at the time of an alleged occurrence, what is necessary is for the evidence to raise in your mind a reasonable doubt as to the occurrence in order for you to find in favor of the defendant regarding that occurrence. Therefore, if you have a reasonable doubt whether the defendant was at a given

place, at a given time, you must find in his favor regarding that occurrence."

This was, in effect, an alibi instruction and the manner and measure of a jury to weigh an alibi of the defendant. All that the testimony needs to do is to raise a reasonable doubt.

29 A. L. R. 1127-1128;
Glover v. *United States* (8th Circ. 147 Fed. 426);
McCook v. *United States*, 263 Fed. 55;
People v. *Vasquez*, 93 Cal. App. 448;
People v. *Fong Ah Sing*, 74 Cal. 253;
Falgout v. *U. S. A.*, 279 Fed. 513.

In this case, as to the overt acts of punishment, which allegedly occurred after March 1, 1945, the testimony of the defendant was that he was working in the warehouse as a clerk, handling electrical supplies; that he did not finish his work until five o'clock in the afternoon, and did not leave the plant until after that time, and at no time was he at the camp itself except a few occasions when he helped Fujisawa interpret some letters and correspondence. This testimony is corroborated by document and by the records introduced by the Government itself as to the nature of Kawakita's employment. This evidence was, therefore, in the nature of an alibi and the jury had to consider it under an appropriate alibi and the quantum of evidence which should have been considered. The court, nevertheless, declined to give this highly important instruction.

As to the other occurrences, Kawakita also denied his presence at any of the places mentioned. As to the Toland incident, the testimony of Dr. Bleich shows that Toland was not working on any ore rock but was on a garden detail from April 21, 1945, on to the close of the war, and therefore Kawakita could not be at that place.

It was the defendant's right to have this instruction given

by the defendant as follows, being Defendant's Instruction 159, on Clerk's Transcript page 277, as follows:

"Evidence that a witness has been insane affects the credibility of such witness. Such insanity is presumed to continue unless shown to have been overcome.

If you find that any witness in this case has been or was insane then you may reject the whole of the testimony of such witness on the grounds of his insanity."

Jones Commentaries on Evidence, page 4893, Sec. 2470;

Holcomb v. *Holcomb,* 28 Conn. 177;

State v. *Kelly,* 57 N. H. 549;

Worthington v. *Menther,* 96 Ala. 310, 17 *A. L. R.* 407, 7 So. 72;

1 Wharton's Evidence, Third Ed. 403;

Coleman v. *Commonwealth,* 25 Grath 865, 18 Am. Rep. 711.

It was shown by the evidence that witnesses had undergone psychiatric treatment for mental conditions.

In a letter to counsel for the appellant a captain in the American Army, assigned to duty in the war crimes trials in Japan, wrote in part as follows:

"Most prisoners of war witnesses still suffer a psychosis which causes them to indulge in a melodramtic self heroism. In my opinion it is a perversion of self pity. I feel free to venture this 'calloused' view since I have spent five years in the Army (2 of them overseas), and my study of POW conditions in Japan establishes that although their lot was a poor one much of the 'horrors' were highly exaggerated and the result of their own deportment.

"Your failure to see 'war atrocities' as treason is shared in by many of my associates here and we all have lived with these problems for some time. You would also be amazed to learn what attitude we have taken toward prisoner of war witnesses. In the initial stage of this war crimes program our approach to these men was indulgent. It wasn't until we discovered that

> this 'self heroism' caused constant exaggeration tantamount to lies. With that revelation our records are replete with vigorous cross-examination of these witnesses, and in a great majority of instances, brought about voluntary refutation."

This letter expresses so admirably the situation and the jury had a right to consider the psychatic treatment given to these prisoners of war witnesses on their return to the United States, and regarding which many of them testified.

We also wish to call to the court's attention Defendant's Proposed Instruction No. 84, Clerk's Transcript page 200, in which we ask the court to instruct the jury that the means set out in Section 801 of the Nationality Act are not the exclusive methods of losing one's nationality. That expatriation is a matter of intent on the part of the person concerned, which intent may be shown by some express act, or some other act from which it can be gathered and that:

> "Any act or declaration on the part of the defendant from which you can determine that he intended to expatriate himself is sufficient to justify a finding of expatriation, and if you so find you must acquit him."

The court declined to give this instruction and gave one stating to the jury that the sole means of losing one's nationality were set out in Section 801 of the Nationality Act—a point we have heretofore argued at length.

We call attention of the Court, also, to our Motion, pages 106, 107, 108, of the Clerk's Transcript, challenging the constitutionality of that act as construed and applied by the court in the instant case.

We think that if the court had had before it the Legislative history and discussions regarding Section 801 of the Nationality Act, which pointed out the reason for the limitation of the act as applying solely to that section, it would not have given the instruction requested by the government

and would not have declined to have given the instruction which we requested and which was refused.

The refusal of this instruction is also contrary to the case of *Perkins v. Elg*, 306 U.S. 325; *Savorgnan* v. *United States*, 94 L. Ed. (Adv.) 203.

The court also erred in refusing to give the jury a definition of the word "comfort" as requested by the defendant in an instruction, No. 149 at page 267 of the Clerk's Transcript. The word "comfort" connotes knowledge on the part of the enemy government that was to be comforted by the act or thing done and we think it was essential for the jury to be so informed.

One instruction was offered by the defendant, Instruction No. 157 on page 275 Clerk's Transcript; on the right of election, which the court also declined.

Several instructions were offered by the defendant regarding the term and definition of the word "allegiance" which the court declined.

While the jury was deliberating, it sent in a request for a definition of the word "betray." The defendant proffered a Webster's complete dictionary definition of the word "betray" in the light of the request of the jury. This was filed at 3:49 P. M. August 31, 1948. [Clk. Tr. 284.] The instruction was refused. It was the right of the jury to have a complete Webster's Dictionary definition of the word "betray," which apparently was bothering the jury on this date—three days before it came in. No satisfactory definition of betrayal was given to the jury, but this definition showing that treason required *betrayal or to deliver into the hands of the enemy by treachery or fraud, in violation of trust; to prove faithless or treacherous to, as to a trust or trusts; to mislead; to reveal; to disclose in violation of a confidence*, were essential definitions because Kawakita at that time did not have a trust which he could betray to the

Japanese government and none of his acts constituted "betrayal" in the sense in which that word is defined.

The defendant also tendered Defendant's Instruction 62-a, page 174 of the Clerk's Tarnscript, regarding the method of considering overt acts—that they cannot be partly proved and partly disproved. It was a highly essential instruction to be given in the light of the variance of the different witnesses who themselves disproved parts of the overt acts in the case.

VI

The Court Erred in the Exclusion of Evidence of the Mayor of Suzuka City

The trial court erred in failing to admit Exhibit CO for identification in evidence. This was the deposition of Ryuzo Sugimoto taken on the 27th day of April, 1948, pursuant to stipulation, and Mr. Sugimoto was the Mayor of Suzuka City, Miye Prefecture, Japan.

Kawakita testified as follows (p. 4384, line 15, to p. 4386, line 14):

> "Q. Mr. Kawakita, when did you decide to get your family name entered in the family register? Just what did you do? Where did you go? A. On March 8, 1943, I went with my uncle—his name is Yazaemon Kawakita, who was the head of the family koseki. I went with him to the Ishiyakushi office of Suzuka City Hall.
>
> Q. And when you got there where did you go? A. We went to the resigtrar of the koseki of our family of our koseki, who took care of our koseki.
>
> Q. What happened after you got there? A. My uncle told the registrar that this is my nephew and he desires to enter his name formally in the family koseki as a Japanese subject.
>
> Q. What did the registrar say? A. The registrar said when I was born and I told him that I was born in September 26th, 1921.
>
> Q. And what else was said or done at that time? A. He asked me—the registrar asked me if it was my

desire to enter my name in the family koseki as a Japanese subject, and I told him yes.

Q. And then what happened? A. That was all—just a minute.

Q. Were some entries made? A. Yes. I gave them the date I was born and the place I was born and I took the family seal and stamped it on the record.

Q. Then after that was done what happened? A. After that was done I had three copies, three or four copies of the Koseki Tohon made for me that I could register at the Tokyo police station for removal of my alien registration.

Q. And did you take a copy of them to the Tokyo police station? A. Yes, sir.

Q. And did you leave a copy there at the Tokyo police station? A. Yes, sir.

Q. After that did you also take a copy of this document to some other place, the place where you were going to work? A. Yes, sir."

Defendant's Exhibit CO was the official interpretation by the mayor of the city as to the legal effect of Kawakita's having registered his name in the Family Register. The foundation was laid as to the knowledge by the Mayor in this city of the legal effects of the entry of the name in the Family Register. The Mayor of the city is a magistrate who, as head of its city, is presumed to know the laws governing the city, and the procedure relating to an affair within the City Government. And he positively testified that he was familiar therewith.

In answer to questions propounded to him, he testified as follows (paragraph 5 to paragraph 12, incl., on page 2 of Exhibit CO):

V

"Q. Are you familiar with the laws relating to a Japanese head of the Family entering the names of those in his family as being Japanese nationals in the family register? A. Yes.

VI

Q. If your answer is 'Yes,' state what those laws are. A. This law of Japan is known as Koseki-ho. This law governs the entry of the names of a family by the family head and the family register.

VII

Q. State what the legal effect is of the head of a family entering the name of members of his family, including the nephew, in the family register. A. When the head of a family enters the name of members of his family including a nephew in the family register, this act of entry becomes a formal R. S. declaration that the member of the family so entered is a Japanese national.

VIII

Q. Does such procedure conform to Japanese law that, when an uncle enters the name of his nephew in the family register at the request of the nephew residing in Japan, such entry constitutes a formal declaration of Japanese nationality according to Japanese law and procedure? A. Yes.

IX

Q. Are you acquainted with the act of Yazaemon Kawakita, from the custodian of the records, wherein an entry was made by him in the official records of your Prefecture, that his nephew, Tomoya Kawakita, was born September 26, 1921, and that he wished on March 8, 1943, to declare himself to be a Japanese national, residing at 409 Uedamachi, Suzuka City, Miye Prefecture? A. Yes.

X:

Q. Did the entry of such name in your register constitute an official declaration of Japanese nationality by Tomoya Kawakita according to Japanese law? A. Yes.

XI

Q. Did his having made this entry become an election, according to Japanese law, that he wished from that time on to be considered a Japanese national? A. Yes.

XII

Q. Did this entry, according to Japanese law and practice, then subject him to all the rights and duties of Japanese nationality? A. Yes."

Ryuzo Sugimoto was the Mayor of the township where Kawakita entered his name in the family Koseki. The Mayor stated he knew the laws and the procedure of his town and of his country. He is as much a qualified expert as is a lawyer. One does not have to be a member of the bar to know the laws. The President of the United States certainly knows the laws of this country and would be as much qualified to testify as would be the Attorney General as to certain laws, likewise a Mayor of a city. In New Jersey two members of the Supreme Court are laymen, not lawyers. The proper foundation for the Mayor's testimony was shown in the deposition itself. He was asked if he knew the laws and he stated that he did. There was no challenge to this statement and it must be taken as correct, therefore it was highly prejudicial for the court to exclude this document from the consideration of the jury.

VII

The Court committed the following other errors in the admission and exclusion of evidence:

(1) *The Court Erred in the Admission of Evidence of Intent.* This constituted a wide inflammatory series of statements which we have set out in the Appendix to our brief, as page references. Each was objected to and it was stipulated that the objections might be deemed to go to all of the testimony thus referred to.

(2) *The Court erred in the admission of the Government's Exhibit 4-F, relating to the procedure and proceedings before the United States Consulate in Japan after the war ended to show that at that time the defendant overcame the presumption of expatriation.* This was entirely irrelevant to the issue of treason. It only showed that as far as that Administrative Officer is concerned that the defendant overcame a then existing presumption of expatriation. The conduct at that time was outside the sphere and scope of the indictment and could not relate back, but could only be confusing and misleading to the jury and since there was no evidence to establish the *corpus delicti*, namely, that Kawakita was an actual citizen of the United States, then owing allegiance to the United States, this testimony was irrelevant in its entirety and should not have been admitted. While we stipulated that the American Consul would testify, as set out in the documents, we did not admit that the testimony was relevant or material or competent to the trial itself.

(3) *The Court erred in permitting the prosecutor to cross-examine Kawakita based upon a statement secured from Kawakita by the F.B.I.* (R. 2918-2966) *but never introduced in evidence, following his unlawful arrest without a warrant* (R. 4243-4254). The use of this statement was objected to and a cross-examination of Kawakita on the basis of his then statements were objected to as violating the defendant's constitutional rights. The objections, overruled should have been questioned.

The use of these statements for any purpose whatsoever was contrary to the decisions of the Supreme Court in the United States in *McNabb* v. *United States*, 318 U. S. 332; *Anderson* v. *United States*, 318 U. S. 350; *Silverthorne Lumber Company* v. *United States*, 251 U. S. 385; *Nardoni* v. *United States*, 308 U. S. 338; *United States* v. *Bayer & Radovich*, 331 U. S. 532; *United States* v. *Bayer*, 156 F. 2d

964; *Chambers* v. *Florida*, 309 U. S. 227, 84 L. Ed. 716; *Canty* v. *Alabama*, 309 U. S. 629, 84 L. Ed. 988; *White* v. *Texas*, 310 U. S. 530, 84 L. Ed. 1342; *Lomas* v. *Texas*, 313 U. S. 554, 85 L. Ed. 1513; *Ward* v. *Texas*, 316 U. S. 547, 86 L. Ed. 1663; *Ashcraft* v. *Tennessee*, 332 U. S. 143, 88 L. Ed. 1192; *Malinski* v. *New York*, 324 U. S. 401, 89 L. Ed. 1029.

The defendant would have been entitled to have the confession suppressed.

In re Fried, 161 F. 2d 453.

In *Silverthorne Lumber Company* v. *United States*, 351 U. S. 385, 64 L. Ed. 319 at page 321, Justice Holmes said:

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all."

VIII

A. The Verdict Was Illegally Obtained Through Coercion. The Verdict and Judgment Are Therefore Null and Void, as Violative of Due Process of Law Guaranteed by the Fifth Amendment to the Constitution of the United States.

The jurors were sent out to deliberate on August 25, 1948. The weather was extremely hot. (Deft. Ex. 1 on Motion for New Trial.) The jury was confined in a small jury room without benefit of any air conditioning, fans, or other things. The janitors brought plenty of towels. The jury had been in charge of four deputy marshals from the United States Marshal's office. On the morning they were sent out to deliberate a crier from Judge Harrison's court was obtained by the trial judge to take charge of the jury. This was Mr. John Scheibe, who was formerly an officer in the United States Navy.

On August 26, 1948, Mr. Scheibe brought the court a note from the jury to refer to some testimony. One of the jurors wanted the testimony of Montgomery on the subject of Overt Act (b) as alleged. The court so stipulated that Montgomery did not testify at all as to Overt Act (b). The testimony of *Fujisawa* was read to the jury, as requested, from page 3585, line 15, page 3644, line 12.

Three days passed without any event and on August 29, 1948 at 3:20 P. M. the court informed counsel that

> "The bailiff has brought me a further communication from the jury which reads as follows:
>
> 'The jury is unable to arrive at a verdict. A majority of the jury feel there is no probability of doing so.
>
> (Signed) Wm. W. Andrews, Foreman.'".

The court then proposed to call the jury in and give them an instruction such as was given in *Alice* v. *United States*, reported in *Allen* v. *United States*, 164 U. S. 492, at 501. Defense counsel objected to the proposed instruction, and also stated:

> "I would oppose any instruction being given to the jury at this time. I think that any comment your Honor would make now would be in the nature of compulsion."

Defendant counsel also moved to discharge the jury but in the absence of discharging the jury stated that if the court wanted to keep them for further deliberation to do so without further comment. It was agreed that the jury might be informed that the court wished them to deliberate further without additional comment. The court at that time stated:

> "Mr. Lavine's position is, as I understand it, that there might be some coercion effected in making any additional comment to the jury at this time above

merely sending them word that the court expects them to deliberate further."

The court then sent them word to continue further deliberation.

On Monday, August 30th, the jury deliberated for a considerable period of time. Court reconvened and the following proceedings occurred:

"The Court: The bailiff has brought me a further communication from the jury which reads as follows:

'The Foreman, personally, respectfully requests permission to approach the bench, or other similar action, for the reason of securing aid and advice of the Court, on a matter of procedure, concerning the proper deliberating of the jury. This matter is, in my belief serious and I am supported in that belief by other members of the jury. The Court's consideration of this request will be appreciated, and of help.

(Signed) Wm. W. Andrews, Foreman.'

Have counsel any suggestions before the jury be brought?

Mr. Lavine: None, your Honor, except that I think now, since their note of last Saturday and their further deliberations this morning, any further deliberation would be in the nature of compulsion, and I therefore move that the jury be discharged. I make that motion in their absence.

The Court: The motion is denied. I understood your motion made Saturday and I understand your view. You would like to have them discharged. I appreciate that, but this has been a long case and they are asked a great many questions to answer and they have not asked to be discharged yet."

The jury was called back into court and the following proceedings took place:

"The Court: Members of the jury, I have received a further communication from the foreman which reads as follows:

'The Foreman, personally, respectfully requests permission to approach the bench, or other similar action, for the reason of securing aid and advice of the Court, on a matter of procedure, concerning the proper deliberating of this jury. This matter is, in my belief serious and I am supported in that belief by other members of the jury. The Court's consideration of this request will be appreciated, and of help.

(Signed) Wm. W. Andrews, Foreman.'

Before anything is said I want to caution you again: The court is not interested until you have reached unanimous agreement in hearing anything about how the jury stands numerically or otherwise, as I told you at the time the case was given to you. So in anything that is said, I want to caution you against any statement of any kind as to how you stand numerically or in any other manner.

What is the question as to procedure?

'The Foreman: Your Honor, it is my belief that we have a juror here who is impeding justice.

The Court: Now, I don't want to hear anything about it. That is indicating how you stand.

The Foreman: Your Honor, it is not——

The Court: It is a question of the procedure.

The Foreman: It does not indicate how we stand.

The Court: Very well. Perhaps I am too hasty.

The Foreman: There are other members. We are not 11 to 1 or anything else.

The Court: I don't want to hear anything about how you stand.

The Foreman: I understand. Excuse me, please, your Honor.

The Court: Proceed, please, Mr. Foreman.

The Foreman: I believe that this juror is impeding justice, interfering with the course of this trial, and making it so that this jury will never and can never arrive at a verdict; and that we are kept there, not only unable to proceed, but with this person who is personally objectionable to some members of the jury.

The Court: Is that the question?' "

The Court then gave them the further instruction to try to agree and suggested that they retire and deliberate further.

The foreman of the jury, Mr. Andrews, on Monday asked that the jury be polled on an opinion of this because he felt that it was utterly impossible and the feeling in the jury room was high as "there is a personal animosity there that could possibly be dangerous."

The Court said that it won't help to poll the jury. "I don't even know the question you wish to be polled upon."

> "The Foreman: We wish to be excused. We feel that we cannot arrive a verdict and the jury has been polled."

Defense counsel then requested that the jury be polled on that question, which request was denied. Juror Clancy spoke. He said, "We have been locked up five nights and five days and we have not accomplished a thing and we never will. There is animosity crept in and there is everything crept in." He said, in answer to the Court's inquiry, that it was impossible for the jury to agree upon a single answer to any one of the 104 questions propounded.

Juror Sidle said he had been on many juries and that every question had been discussed. "We approached it from every angle. There isn't an angle that I can think of that could be approached that would bring about, as we feel, any positive result or agreement. We agree and not agree, and we just can't get anywhere with a situation, in the slang phrase 'hung up.' That is what we are up against." After stating that they had devoted all their energies and studied it from every angle, he continued: "It has gotten to the point where, personally, I feel that there is absolutely nothing can be done. Of course, if the Court has anything or could do anything to help—but I understand. I am willing to go ahead as long as my energies will hold up."

The Court discussed the subject further with the jury, making, among other remarks:

"You are the sole judges of how you shall deliberate, and while the court may keep you deliberating, the court can't make you deliberate. It is the old story: You can ride a horse to the water, but you can't make him drink.

When a situation like this is reached, the court tries to be of assistance to the jury. Frequently the position is made—and in many instances, perhaps, properly so—that the court is attempting to coerce the jury or to force the jury to arrive at a verdict."

The Court then gave jury a further instruction that it was their duty to agree, unless it would do violence to their individual judgments, and by the minority to have a disposition to be convinced by the majority. We will discuss this more fully.

After further discussion, the Court asked if the jury wished any further suggestions, whereupon the *foreman* said:

"I still insist, Your Honor, that it is utterly impossible. Persons of ordinary and reasonable intelligence could discuss things and arrive at any point——

The Court: That was not my question. My question was: Do you want any further suggestions from the court?

The Foreman: I renew my request that the jury be dismissed, Your Honor."

Whereupon, Mrs. Ziegler, a woman juror, raised her hand and the Court said:

"The Court: Who was it had up their hand? Mrs. Ziegler, do you have something?

Juror Ziegler: Perhaps not. May I, Your Honor?

The Court: Yes; you may.

Juror Ziegler: Would it be out of form to have a new foreman? Mr. Andrews has not been well over the week end and somebody else has not.

The Court: You are entitled to elect your own foreman at any time.

Juror Ziegler: That would not help any.

The Foreman: I might say that the lady nominated me for foreman, Your Honor.

Juror Ziegler: Yes; I did."

The Court then gave an instruction to the jurors which e will hereafter quote in full and attack. Thereupon, oreman Andrews, after the instruction to the jury, again ated to the Court:

"The Foreman: May I be heard further, Your Honor? I think the court does not understand the point that I raise. No one here objects to which way any juror voted, but the manner and statements made indicate to us this long time that it is going to be utterly impossible to complete this. It is not—no one here objects to any way or which way.

The Court: I understand that, Mr. Andrews.

The Foreman: I was not trying to state how the jury stood. But there is one question——

The Court: But sometimes, when people differ with us, that affects our opinion of them, you know.

The Foreman: I understand that, but as time goes by, it seems to me that sufficient time has gone by. That is my personal opinion and I have a great hesitancy for returning to the jury room.

The Court: Well, Mr. Andrews, you are a lawyer. Let me suggest to you that maybe you are able to arrive at your conclusion in some of these matters more rapidly by reason of your legal training. It may be necessary for some of the others to catch up with you.

The Foreman: I am not alone, sir.

The Court: Well, that may be true, too.

Mr. Lavine: I again renew my request, Your Honor, in view of that statement, to discharge the jury.

The Court: Do you have something further, Mrs. Ziegler? You raised your hand.

Juror Ziegler: I don't feel like going out under the circumstances; I really don't.

The Court: It is very difficult, ladies and gentlemen of the jury, to the court to feel that you have completed your deliberations to the extent that you could under the court's instructions and not be able to arrive at a unanimous answer to one of the 104 questions presented to you. That may be the case.

It has been a long trial, as I say, and I know you are tired and you would like to be done with it. But in all the circumstances which have been mentioned here, I would ask you to deliberate further, to try further to see if you can't come to a **unanimous agreement.** If you can't answer all the questions, answer as many as you can. And, remember, again, that no juror is expected to surrender his honest convictions if, after full deliveration and attention to the views of his or her fellow jurors, he or she remains convinced of the correctness of his or her stand on any matter involved.

You may now retire."

Three days later the jury came in with a general verdict of guilty, and a finding against the appellant of eight of the overt acts. The jurors were thoroughly exhausted and on the verge of nervous collapse. Such a verdict is coercive.

The length of time within which the jury may be held to deliberate has been the subject of frequent discussion and coercive verdicts are in violation of due process of law guaranteed by the Fifth Amendment to the Constitution of the United States, as denying a fair trial to the accused, since the deliberation and determination of the questions of innocence or guilt are equally due process questions.

In some states it has been held by statute that where a jury twice requests that it be discharged that it is man-

atory to discharge them and a failure to do so is reversible rror.

The following four states have been held by statute irecting deliberation of the jury, as follows:

"In *Florida, Maine, South Carolina* and *Wisconsin* there are statutes regulating the number of times a trial court may send a disagreeing jury back for further deliberation. The Status in Wisconsin and South Carolina are identical, as follows: 'When a jury after due and thorough deliberation upon any cause shall return into court without having agreed on a verdict, the court may state anew the evidence or any part of it and may explain to them anew the law applicable to the case, and may send them out again for further deliberation; but if they **shall return a second time without having agreed on a verdict, they shall not be sent out again without their own consent, unless they shall ask from the court some further explanation of the law.**' (Code of Laws, S. Car. 1902, § 2949; Wis. Stat. 1898, § 2855.) In Florida the statute is the same, except that it omits the words 'may state anew the evidence or any part of it.' Rev. Stat. Fla. 1892, § 1093. In Maine the wording is somewhat different. The statute provides as follows: 'When a jury, not having agreed, return into court stating the fact, the justice may, in his discretion, explain any questions of law, if proposed to him, or restate any particular testimony, and send them out again for further consideration; but they shall not be sent out a third time in consequence of their disagreement, unless on account of difficulties not stated when they first came into court.' Rev. Stat. Maine 1903, c. 84, § 100."

"In State v. Kelley, 45 S. Car. 659, 24 S. E. Rep. 45, the jury had been kept together twenty-four hours, during which time they had made repeated attempts to communicate with the judge. Finally they were brought into court and told the judge that it was impossible for them to agree, whereupon he sent them back for further deliberation. One of the jurors pro-

tested against being sent back. The Supreme Court held that the statute had been violated, and granted a new trial."

American & English Annotated cases, Volume 11, p. 1132;
State v. *Place*, 29 S. Dak. 489.

South Carolina:

1902: Code of Laws, 1902, sec. 2949;
1942: Latest statute regarding same subject matter is Code of Laws, sec. 642, 1942. (1932 Code, sec. 642; Civ. P. 1922, sec. 582; Civ. C. 1912, sec. 4050; Civ. C. 1902, sec. 2994; G. S. 2268; R. S. 2409; 1797(5) 358.)
State v. *Stephenson*, 1898, 54 S. C. 234, 32 S. E. 305, 11 L. R. A. (N. S.) 178: Juries may not be coerced in this state by confinement . . .;

Florida:

Rev. St. Fla., 1892, sec. 1093.

Statute applies to both civil and criminal cases. (*Adams* v. *State*, 34 Fla. 185, 15 So. 905; *ambright* v. *State*, 34 Fla. 564, 16 So. 582—1894 cases.)

While sections 1093 and 2925 Rev. Stats. (secs. 4368, 8402 Comp. Gen. Laws, 1927), confer the legal right upon juries to be discharged where the circumstances therein mentioned exist, they were not designed to abridge in any way the judicial discretion vested in the judge to order such discharge whenever a proper case is presented for the exercise of such discretion, even though the circumstances warranting such discharge are not such as invest juries themselves, under the statute, with the right to demand their discharge. (Citing *Smith* v. *State*, 40 Fla. 203, 23 So. 854; *Tervin* v. *State*, 37 Fla. 396, 20 So. 551—1896 cases.)

Remark: The Florida statute is as of 1934 according to the Florida Digest; the So. Carolina statute is as of 1942.

Wisconsin:

Statutes, 1898, Sec. 2855.

Maine:

Rev. St. Maine, 1903, c. 84, sec. 100.

Such statutory mandate shows the legislative view of what constitutes coercion in obtaining the verdict of the jury.

"A verdict based upon any other method than by the exercise of the full and free judgment of the individual jurors and the weighing of the evidence is invalid. It is regarded as coercive conduct for the court to threaten to keep the jury in long continued confinement."

People v. *Sheldon*, 155 N. Y. 268, 53 N. E. 841, 41 L. R. A. 644.

See:

People v. *Walker*, 209 P. 2d 834 at 838.

In *State* v. *Bybee*, 17 Kan. 462, the court said:

"A verdict is the expression of the concurrence of individual judgments, rather than the product of mixed thoughts. It is not the theory of jury trials that the individual conclusions of the jurors should be added up, the sum divided by twelve, and the quotient declared the verdict, but that from the testimony each individual juror should be led to the same conclusion; and this unanimous conclusion of twelve different minds is the certainty of fact sought in the law.' It may be said that any act or instruction of a trial court, which tends to violate this theory of a verdict, amounts to coercion."

In *People* v. *Sheldon*, 41 L. R. A. 644, the court held that:

> "The old rule permitting coercion of a jury in order to secure a verdict has been swept away, and under our present method the independence of a jury is respected."

The court, in that case, which was decided July 7, 1898, quoted from *People* v. *Olcott*, 2 Johns. Cas. 301, 1 Am. Dec. 168, where Mr. Justice Kent, in an opinion reviewing prior cases at length paid his respect to the rule formerly existing of compelling an agreement of the jury, said:

> "'The doctrine of compelling a jury to unanimity by the pains of hunger and fatigue, so that the verdict in fact be founded, not on temperate discussion and clear conviction, but on strength of body, is a monstrous doctrine, but does not . . . stand with conscience, but is altogether repugnant to a sense of humanity and justice. A verdict of acquittal or conviction, obtained under such circumstances, can never receive the sanction of public opinion. And the practice of former times of sending the jury in carts from one assize to another, is properly controlled by the improved manners and sentiments of the present day'."

It is the duty of the court to discharge the jury if they do not agree after all of the views of the several jurors are expressed and presented in the different forms and individual opinions of the jurors are fully and conscientiously made up.

People v. *Faber*, 199 N. Y. 256, 92 N. E. 674.

A trial judge must not either expressly or by any act or language state anything which will carry an implication as to how long he intends to keep the jury deliberating.

Waite v. *Mississippi*, 124 So. 803;
Stewart v. *United States*, 300 Fed. 769;

Dudley v. *State*, 113 S. E. 24, 28 Ga. App. 711;
People v. *Davidian*, 20 Cal. App. 2d 720.

"Charge held to be coercive."

People v. *Demeaux*, 160 N. W. 634, 194 Mich. 18;
People v. *Curtis*, 98 P. 2d 228;
Brasfield v. *United States*, 272 U. S. 448, 71 L. Ed. 345;
Jordan v. *United States*, 22 F. 2d 966;
23 Corpus Juris Secundum, Sec. 1043, 612 La. 98, 135 S. W. 2d 111;
People v. *Bruneman*, 4 Cal. App. 2d 75, 42 P. 2d 891.

In *Bollenbach* v. *United States*, 326 U. S. 607, 90 L. Ed. 354, the court said:

"'The influence of the trial judge on the jury is necessarily and properly of great weight,' Starr v. United States, 153 U. S. 614, 626, 38 L. Ed. 841, 845, 14 S. Ct. 919, and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating abstract charge.

"An experienced trial judge should have realized that such a long wrangle in the jury room as occurred in this case would leave the jury in a state of frayed nerves and fatigued attention, with the desire to go home and escape overnight detention, particularly in view of a plain hint from the judge that a verdict ought to be forthcoming."

To keep the jury deliberating under these circumstances in the heat and struggle that then existed was a violation of every fundamental right of the accused. It violated his right to fair trial under the Fifth Amendment to the Constitution of the United States.

B. The Court Erred in the Instructions Given While the Jury Was Deliberating

The Court gave the following instruction to the jury on August 30th, after agreeing with counsel on August 28th that it should give no instructions. But, two days later, the Court gave the following instruction:

> "The Court: Let us not get into that. These personalities do not have anything at all to do with the court—and these personal relationships sometimes are the things that keep us from being open-minded and arriving at a verdict.
>
> The Court wishes to suggest a few thoughts which you may wish to consider along with your consideration of the evidence and all the instructions previously given you.
>
> This is an important case. The trial has been long and expensive. If you should fail to agree on a verdict, the case is left open and undecided. Like all cases, it must be disposed of sometime. There appears no reason to believe that another trial would not be equally long and expensive; nor does there appear any reason to believe that the case can be again tried any more exhaustively than it has been on the part of either side.
>
> Any future jury must be selected in the same manner and from the same source as you have been chosen. So there appears to be no reason to believe that the case would ever be submitted to twelve men and women more intelligent, more impartial, more competent to decide it, or that more or clearer evidence could be produced on the part of either side.
>
> As I told you at the time I instructed you, it is rarely possible to prove or disprove, either way—it is rarely possible to prove or disprove anything to an absolute certainty.
>
> Upon brief reflection, the matters I have mentioned suggest themselves, of course, to all of us who have sat through this trial. The only reason they are mentioned is because some of them may have escaped your attention, which must have been fully occupied in your con-

sideration of all the evidence up to this time. These are matters which, along with other and perhaps more obvious ones, remind us of the desirability that you give the jury's *unanimous* answer to the questions asked on the 13 forms of special verdict submitted and that you *unanimously agree* upon a general verdict of guilty or not guilty if you can do so without violence to your individual judgment and your conscience.

It is unnecessary for me to say again that the court does not wish any juror to surrender his or her conscientious convictions. As I stated at the time the case was submitted to you, do not surrender your honest convictions as to the weight or effect of evidence solely because of the opinion of other jurors, or for the mere purpose of arriving at a verdict.

As I said at the time, also, it is your duty as jurors, however, to consult with one another, and to *deliberate with a view of reaching an agreement* if you can do so without violence to individual judgment.

Each of you must decide the case for yourself, but you should do so only after a consideration of the evidence with your fellow jurors. And in the course of the deliberations you should not hesitate to change an opinion when convinced it is erroneous. And certainly a juror should never hesitate to change his opinion by reason of personalities, if they are convinced from the evidence *and from the arguments made in the jury room* that the opinion they had previously held is erroneous.

In order to bring 12 minds to *unanimous* results, you must examine the questions submitted to you with candor and frankness, and with proper regard and deference to the opinion of each other. That is to say, in conferring together you should pay due attention and respect to each others opinions and listen to each others arguments with a disposition and open-minded —*a disposition to be convinced.* If the much larger number of you are for a conviction, each dissenting juror should consider whether a *doubt in his or her own mind is a reasonable one,* since it makes no effective impression upon the minds of so many equally

honest, equally intelligent fellow jurors who have heard the same evidence, with the same attention and with an equal desire to arrive at the truth and under the sanction of the same oath.

On the other hand, if a majority or any substantial number of you are for acquittal, the other jurors ought seriously to ask themselves again whether they do not have reason to doubt the correctness of a judgment which is not concurred in by many of their fellows:

Mr. Lavine: Had your Honor concluded?

The Court: No. The court and the jury are here to come to a just and righteous result in this case. You are as anxious to reach that result, I know, as I am.

As I have stated to you before, you are not partisans. You are judges—judges of the facts and your sole purpose is to ascertain the truth as to the facts from the evidence, and in ascertaining the truth as to the facts you are the sole and exclusive judges.

You must know it by heart by now. You are the sole and exclusive judges of the credibility of the witnesses and the weight and effect of all the evidence, and in the performance of your duties you are entitled to disregard, disregard entirely all comments of the court and counsel in reaching your own judgment and in making your own findings as to the truth as to the facts.

Let me repeat again so that you will not feel that any remarks I have made are intended to put any coercion or pressure upon you: No juror is expected to yield a conscientious conviction he or she may have as to the credibility of any witness or as to the weight or effect of any evidence, *but, as I have previously said, it is your duty, members of the jury, to agree*, unless after a full and impartial consideration of all the evidence with your fellow jurors, to agree would do violence to your individual judgment and conscience.

There has been some suggestion here—there was Friday—that some of you were very tired. Perhaps I should have suggested to you at the outset that you may be as leisurely in your deliberations as the occasion and circumstances may require. Sometimes

jurors may fail to agree because they hurry too much to try to agree. Sometimes people do that.

I do not speak in any critical vein. We are dealing with an attempt to get 12 human beings to arrive at a common conclusion as to the truth.

You will remember at all times if any doubt remains in your mind, any reasonable doubt, as to the guilt, the defendant is entitled to your verdict of acquittal.

The bailiffs have been instructed to take you to your meals whenever you wish to go, to take you to your hotel whenever you wish to go. You are to take all the time you may feel necessary for your deliberations.

You may now retire and continue your deliberations as your good and conscientious judgment as reasonable men and women may determine." (Emphasis ours.) (R. 5627-5633.)

In the setting of this case, such an instruction was positively reversible error and has been condemned in this Court in *Peterson* v. *United States*, 213 Fed. 920, C. C. A. 9.

For six days the jury had deliberated and had reached a conclusion as to their own individual opinion. To request the dissenting jurors at that time to consider whether a doubt in his or her mind was a reasonable one—when that juror had had a reasonable doubt for six days—was to ask the surrender of one's individual opinions, and to use the language of the instruction

"a disposition to be convinced"

even against one's own conviction. Such an instruction at that time denied fair trial to the accused and is prejudicial error.

The Court, in another phase of its instruction said:

"No juror is expected to yield a conscientious conviction he or she may have as to the credibility of any witness or as to the weight or effect of any evidence, but, as I have previously said *it is your duty, members*

> *of the jury, to agree,* unless after a full and impartial consideration of all the evidence with your fellow jurors to agree would do violence to your individual judgment and conscience."

We know of no law or rule that makes it a duty of a juror to agree upon a verdict nor to agree lest it would do violence to their individual judgment and conscience. The duty of a juror is to reach a true and correct result, whether they agree or not with the other jurors. It was a mandate to the jury of coercion; it was the language of command they had to agree, and that language was obeyed for fear of its possible consequences.

Even in the face of this language, the foreman of the jury protested.

The trial court erred in instructing the jury that it was their *duty* to agree upon a unanimous verdict if they could.

This court held such language to be error in *Peterson* v. *United States,* 213 Fed. 920, 924 (C. C. A. 9), wherein this court said as follows:

> "Turning now to another instruction complained of. It seems that the jury first retired to consider of their verdict on Friday afternoon, and, after being out for some time, they returned into court for further instructions, which were given. They again retired, and, after remaining out all night, came into court about 11 o'clock Saturday morning, and, through their foreman, reported that they had agreed as to the defendant Walter Peterson, but were unable to agree as to the other two. Thereupon the following statement was made to them by the court:
>
> 'The court at this time declines to receive a verdict as to one defendant. The case should be finally disposed of as to all. This is, as you know, the second trial. To try it again means to try it before a jury drawn from the same community that you have been, and with no reason to believe that they would be any

more intelligent or honest than you are or any more likely to arrive at a verdict. Justice to both parties demands that the case be brought to an end. The expense of these trials is very great; possibly the expense of the parties so far incurred is from $7,000 to $10,000. The government has a right to a verdict without further expenditure of time and money. The defendants, if guilty, have a right to have the fact determined by a verdict before they are bankrupt in pocket, and likewise if they are innocent they have the right to be acquitted before their means are exhausted. You state, in answer to the court's question, that you stand seven to five. If seven are for an acquittal, the five should seriously inquire whether there is not a reasonable doubt of the guilt of the defendants when seven of their fellows of equal intelligence and honesty have found that there is; if seven are for conviction, the five should equally seriously inquire whether there is a reasonable doubt of the guilt of the defendants when seven of their fellows of equal intelligence and honesty find there is no doubt. After three days spent in the trial of this case, with no reason to believe that it can be any better tried before another jury, the court is disposed to direct you to further consider the case, believing that you can honestly come to an agreement.' "

As said by this Court in the following paragraphs:

". . . it is difficult to conceive what basis there was at that juncture for believing that the jury could honestly agree. . . . . It was not correct to say that the government had a right to a verdict without further expenditure of time and money; it had only a right to fair consideration of the case. No obligation rested upon it to make any further expenditure, for, in case of a mistrial, it would have been the right, if not the duty, of the prosecuting officers to dismiss the prosecution. In any event, it was not its right to demand an agreement; nor did the defendant have such right."

We add, neither did the court. The instruction was reversible error.

The defense counsel objected upon the retirement of the jury and repeatedly requested dismissal on the grounds of coercion. The trial judge expressed disagreement with some of the remarks that have been made by appellate court judges by coercion of juries. He expressed himself as follows to the defendant's objections to sending the jury out again. He said:

> "The Court: What has happened here, I think is a perfect answer to people who think that trial judges by asking a jury to try again to get together coerce them into finding a man guilty whom they really think is innocent. I don't think there is anything to it. I think it is an insult to the jury to suggest it. I do not believe any juror who is conscientious enough to hold out for his views, just because the judge asks them to try again to agree, is going out and say: Well, it is all right with me. I don't think he is guilty but I will go along with you. I do not think that ever happens, **with all due respect to some of the remarks that have been made by appellate court judges on the subject"** (Rep. Tr. p. 5637, lines 9 to 20, incl.).

Bear in mind the case was submitted to the jury on August 25, 1948. Four days later on August 29th the foreman reported to the Court that the jury was unable to agree (Rep. Tr. p. 5597). But the Court directed them to deliberate further. On August 30th three of the jurors indicated that no verdict could be reached (Rep. Tr. pp. 5622-4). And the foreman requested that the jury be discharged (Rep. Tr. p. 5626, lines 21 and 22). But again the Court refused to discharge the jury and proceeded to give a supplemental instruction regarding the desirability of reaching a verdict (Rep. Tr. p. 5627 *et seq.*). This instruction was error under the circumstances and coerced the jury into reaching a verdict even though the Court attempted to caution the jurors not to surrender his conscientious convictions.

As the Court of Appeals for the Eighth Circuit said in *Edwards* v. *United States*, 7 F. 2d 598:

> "In this case the jury, after 24 hours' deliberation upon a narrow issue, had disagreed. The foreman, when questioned expressed no hope of the probability of an agreement, and yet a speedy agreement was arrived at, acquitting the defendant on certain counts and convicting him on another, where there appeared to be little if any difference in the degree of proof adduced. We think the trial court erred in giving the supplemental instruction in the language disclosed by the record, and that such error tended to deprive the defendant of a fair trial. The case should be and is reversed and remanded for a new trial. Reversed."

And the said Court of Appeals in *Nick* v. *United States*, 122 F. 2d 660, said:

> "If such statement is made in the face of an existing disagreement in the jury it is quite evident that its entire force would be felt as applying to an existing situation which had developed. *Language which might be innocent if uttered before submission of the case to the jury might be regarded as harmful if applied to a specific existing disagreement.*"

In the case at bar the supplemental instruction was given after four jurors had indicated no agreement could be reached and after the foreman had requested that the jury be discharged.

As the Supreme Court of the United States said in *Burton* v. *United States*, 196 U. S. 283, 25 Sup. Ct. 250, 49 L. Ed. 482, where the jury had been out but 36 hours:

> "Balanced as the case was in the minds of some of the jurors, doubt existing as to the defendant's guilt in the mind of at least one, it was a case where the most extreme care and caution were necessary in order that the legal rights of the defendant should be preserved. * * * A slight thing may have turned the balance

against the accused under the circumstances shown by the record, * * *."

As was said in *Stewart* v. *United States*, 300 Fed. 769:

> "The jury in this case had deliberated many hours and had disagreed. There was at least one juror, perhaps more, that was convinced that the defendant was not guilty. The crucial questions in this case were questions of fact, that it was peculiarly the duty of the jury to consider and decide, among other things, the intention, the knowledge, the belief, the purpose, and good faith of the defendant Stewart. Much of the evidence on these questions was circumstantial; the testimony upon them was conflicting. The jury had disagreed. They received the supplemental charge from the court, retired, and in a short time returned with a verdict of guilty. As was said by the Supreme Court in Burton's case, 'a slight thing may have turned the balance against the accused under the circumstances shown by the record' (196 U. S. 307, 25 Sup. Ct. 250); the supplemental charge and especially the excerpt from the opinion in Allen's case were more than a slight thing, and our conclusion is that they bore too hard upon the convictions of the minority of the jury, and that an impartial and fair administration of justice will be served by a new trial of this case."

In the case at bar the questions to be answered were just as crucial question of fact with circumstantial evidence and conflicting testimony. The supplemental instruction of the Court was more than a slight thing, especially the part regarding the desirability of the minority listening to the majority to consider if they were mistaken. See *Peterson* v. *United States*, 213 Fed. 920 (C. C. A. 9).

As was said in *Bollenbach* v. *United States*, 326 U. S. 607:

> "* * * But precisely because it was a 'last minute instruction' the duty of special care was indicated in replying to a written request for further light on a vital

issue by a jury whose foreman reported that they were 'hopelessly deadlocked' after they had been out seven hours. 'In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law,' Quercia v. United States, 289 U. S. 466, 469. 'The influence of the trial judge on the jury is necessarily and properly of great weight,' Starr v. United States, 153 U. S. 614, 626, and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge's last word is apt to be the decisive word. * * *"

See also:

Nigro v. *United States*, 4 F. 2d 781 (C. C. A. 8);
Gideon v. *United States*, 52 F. 2d 427 (C. C. A. 8);
United States v. *Samuel Dunkel & Co.*, 173 F. 2d 506 (C. A. 2).

After reviewing *Allen* and other cases, says:

"Hence each charge must be examined to determine whether or not its effect is to coerce or influence unduly, and a mere formal saving clause alluding to the jury's rights will not suffice to overcome a total effect of coercion. * * *"

C. Separation of the Jury While Deliberating

After the case was submitted to the jury there was an unlawful separation of the jurors. After the jury was taken out to deliberate during the hot month of August, 1947, and after they had deliberated for quite a while, they were taken to the Angeles Hotel at Fourth and Spring Streets. There were three bailiffs at the hotel (Rep. Tr. p. 5736). The jurors occupied three floors, they visited in different rooms unattended (Rep. Tr. pp. 5736, 5737). The testimony of the jurors on the motion for new trial shows that there was but three bailiffs and the jurors were

permitted to come and go as they pleased so that they were not at all times under the supervision of a bailiff. Juror Clancy at reporter's transcrip, page 5735 *et seq.* showed that he was permitted to go to the barber shop accompanied by one of the bailiffs. Some of the jurors remained in the lobby of the hotel. Others went to their rooms. The rooms were on at least two floors, perhaps three. Hence it was a physical impossibility for the jurors to have been accompanied by a bailiff. In addition the bailiffs and doctors were permitted to talk to the jurors, without the knowledge or consent of the defendant.

As was said in *Baker* v, *Hudspeth,* 129 F, 2d 779 (C. C. A. 10), at page 782:

> "The purpose of keeping the jury in one body during the trial of the case and not permitting them to separate except under the supervision of the bailiff or officers of the court, is to make sure that nothing they read, see, or hear shall influence them in the consideration of the case committed to them. 23 C. J. S., Criminal Law, §1348, page 1010. If it is made to appear that a jury sworn to try a case is subjected or exposed to any matter or thing which might *tend* to prejudice or influence their consideration of the case, or if the behavior of any member thereof is unbecoming to a gentleman of the jury, a presumption arises against impartiality and that presumption can only be rebutted by a clear and positive showing that such matter, thing, or behavior did not influence their verdict. * * *"
> (Citing cases.)

In view of the testimony of Juror Clancy the Court should have permitted the defendant to fully examine all of the jurors as to their conduct during the deliberations. Not to impeach the verdict as such but to ascertain the extent of extraneous interference upon the jury's deliberations.

See:

Mattox v. *United States,* 146 U. S. 140;

Hyde v. *United States*, 225 U. S. 347;
Chambers v. *United States*, 237 Fed. 513;
Wheaton v. *United States*, 133 F. 2d 522;
United States v. *Sorcey*, 151 F. 2d 899.

The separation of the jury and communications with the bailiffs and others raised a presumption of partiality and prejudice to the defendant. True, it is a rebuttable presumption, but in the case at bar it was not rebutted.

B

During the Deliberations of the Jury Not Only Were They Permitted to Separate Without Leave of Court and Without the Knowledge of Defendant or His Defense Counsel, but Also Some of the Jurors Became Ill and a Doctor Was Called to Treat This Juror Without Any Knowledge of the Defendant or His Counsel at the Time, and Who Were Not Informed, as a Matter of Fact, Until After the Trial Had Concluded.

On Sunday, August 29, 1948, a Doctor Was Called in to Treat the Foreman of the Jury, William W. Andrews. Such Doctor Was Present With the Juror, Who Was Seriously Ill, and Medicines Were Brought to the Juror, All Without the Knowledge of Defendant or His Counsel.

The Jurors Were Kept in a Room, Ill-Ventilated and Without Air Conditioning, During the Intense Hot Weather and Were Compelled to Deliberate Until Exhausted. By Reason of the Condition of the Heat, the Jury Rooms Were Open From Time to Time.

Other Jurors Became Ill and Had to Have Medical Treatment and Care During the Deliberation All Without Knowledge of the Defendant or His Counsel.

That Such Procedure and Proceedings Denied the Defendant a Fair Trial Guaranteed by the Due Process Clause of the Fifth Amendment to the Constitution of the United States and Was Coercive.

Furthermore, it was error for the trial court to have permitted any outsider in the jury room, or in communication in any manner, shape or form, with any juror or jurors without the complete knowledge of defendant and his counsel. Such is the oath given to the bailiffs or marshals upon their receiving the jury.

It would be an easy matter to communicate some message or messages through a doctor to a jury or jurors and such facts should have been fully and fairly disclosed to the defendant and his counsel. If there was genuine illness, then it could well have been a matter for the consideration of motions to discharge the jury because of that illness. It would certainly be coercive on the other jurors to force a jury to consider when one or more of their members was so ill he could not deliberate and it would deprive the jury of a full amount of 12 jurors.

The courts have held many times that the presence of an outsider in the jury room, or in contact with the jury, after a case has been submitted to the jury, is sufficient grounds for an order setting aside the verdict (*People* v. *Bruneman*, 4 Cal. App. 2d 75-80).

Even the judge in charge of the jury may not go to the jury room or talk to a single juror. His official place is on the bench and even as to him the law has closed the portals of the jury room and he may not enter.

Rickard v. *State*, 74 Ind. 275;
State v. *Wroth*, 15 Wash. 621 (47 Pac. 106);
Gibbons v. *Van Alstyne*, 56 Hun. 639 (9 N. Y. Supp. 157).

Therefore, not even a doctor should be permitted to enter, except under a situation in which both sides are informed and fully consent; and if the situation is of such emergency, at least the parties should be notified and all the facts disclosed as soon as possible and their consent secured.

The jury had to be a full jury, composed of 12 persons, in full possession of their mental and physical capacities; otherwise it was not a jury as it exists at common law, consisting of twelve persons.

People v. *Keily*, 203 Cal. 128, 133 (263 Pac. 226);
People v. *Powell*, 87 Cal. 348, 355 (25 Pac. 481, 11 L. R. A. 75);
Jennings v. *State*, 134 Wis. 307 (14 L. R. A. (N. S.) 862);
Dennis v. *State*, 25 L. R. A. (N. S.) 36.

In *Ray* v. *United States* (8th Cir.), 114 F. 2d 508: Communications between any outsider and the jury after it has retired to deliberate should only take place after counsel for the respective parties have been informed and with the full knowledge of the defendant, if he is present (*Fillippon* v. *Albion Vein Slate Company*, 250 U. S. 76, 63 L. Ed. 853; *Ah Fook Chang* v. *United States* (9 Cir.); 91 F. 2d 643; *Fina* v. *United States* (10 Cir.), 46 F. 2d 643). Private communications, even though harmless in themselves, may open the way to abuses and destroy confidence in legal procedure and the judiciary.

In this case, when the jury returned into the court, it was of vital importance to know the medical treatment that was afforded the jurors in view of the consequence of the proceedings.

"Courts are extremely jealous about anything occurring with the jury, which does not become of record in the court room."

Mattox v. *United States*, 146 U. S. 140, 36 L. Ed. 917.

Had we known what the doctor, or doctors, had said and done prior to the jury's return into court asking for its discharge, we could have well presented an argument to the trial judge which would have required either his immediate discharge of the jury or his postponement thereof until it was determined that at least one or more of the jurors was physically able to continue. Certainly this was a right which the defendant had and was taken away from him.

During jury deliberations two or more jurors became ill. These facts were concealed from the defendant and his counsel and only after the jury was finally discharged did they learn of it.

Juror Andrews' physical condition was described by Dr. Leo Praeger, a house physician of the Angeles Hotel (R. 5707, *et se.*). Dr. Praeger said he was called on August 29th and he went to the room at about 10:00 or 10:30 in the morning, having been called around 9:00 o'clock. He went to Juror Andrews' room and found him extremely nervous. He made a diagnosis of nervous exhaustion (R. 5709). The juror told him he had not been able to sleep for the last 48 hours; he had been under a nervous strain. He told the doctor and the bailiff that if he was taken out he wanted to sit in the back of the car. He did not want to sit with the other jurors (R. 5710). He said he didn't know what might happen to him, or what he might do to somebody if he didn't sit in the back of the car (R. 5711). He said he wanted to sit where "I won't have to fight with somebody" (R. 5711). He examined the man's heard and blood pressure and on the basis of that dignosed the matter as nervous exhaustion. He left some medicine for the juror and told the bailiff to keep the man as quiet as possible, and see that he had no more excitement (R. 5713).

No information was given to counsel for the defendant or the defendant regarding the doctor's visit or attention to the juror.

In talking to Juror Clancy, Juror Andrews said "something about the talk in the jury room, the hearing room, was going around all the time and he was getting filled up on it, and could not permit it, or something like that." He was getting tired of the whole thing and it was going around in his mind all the time, and he could not sleep (R. 5728). It was very hot in the jury room (R. 5730):

Juror Otillia Younger was examined and treated in a bus by Drs. Shaw and Sommers (R. 5718). She was suffering from itching in the external canal and a case of sharp shooting pains in the ear proper (R. 5718). Again the court failed to notify counsel or the defendant of the presence of outside persons in connection with the jury.

During the deliberation one of the jurors went into the ladies apartment and comemnced to cry, and the other lady jurors went in and one of them gave her some smelling salts or something (R. 5739). After the jury was discharged, Juror Nagumo had a nervous collapse.

(a) It is peculiar that the factual situation in most of the cases on this subject have been instances when the court *has* discharged the jury or a juror; nevertheless, the principles governing those cases should, logically, apply even though the factual situation is reversed—*where the court has* FAILED *to discharge the jury or a juror.*

It is obvious that a juror who is too sick to intelligently deliberate can, by remaining on the jury thwart the administration of justice with as much efficacy as can the *discharge* of a juror who is well enought to intelligently deliberate. THUS THE **legal** QUESTION IS ALWAYS THE SAME: **Has there been an abuse of discretion** (regardless of whether the outcome of such abuse is a discharge of the juror or a failure to discharge the juror)?

In all cases in which the health of a juror comes to the attention of the court, an orthodox judicial procedure should be followed in exercising the discretion of the court.

Otherwise there can be no possibility of a review in such matters.

Speaking on the subject of exercise of such discretion the court in *Stough* v. *State*, 128 P. 2d 1028, said:

> "It is idle to argue that the discharge of the jury would not materially affect the rights of the defendant. *Has he no right to be heard?* Who can say that he might not have urged some reason which would have influenced the Court in the *exercise* of its *discretion*?"

Discretion to do *what?* To discharge or not to discharge, AND the defendant should have as much right to argue *for* discharge as against it.

See also:

Upchurch v. *State*, 38 S. W. 206;
State v. *Chandler*, 274 Pac. 303.

This deprived the defendant of due process of law guaranteed by the Fifth Amendment to the Constitution of the United States, and of jury trial guaranteed by the Sixth and Seventh Amendments.

Snyder v. *Massachusetts*, 290 U. S. 606;
Hopt v. *Utah*, 110 U. S. 574.

If the right to discharge a juror for illness requires the judge to conduct a proceeding in open court in the presence of the defendant and his counsel then the right to retain an ill juror suffering from nervous exhaustion requires that the defendant and his counsel be promptly informed about the juror's illness and treatment so that he may duly inquire and make appropriate motions or objections to the retention of a juror who is incapacitated and unable to deliberate.

On August 30th, Jury Foreman Andrews, who had been diagnosed as suffering from "nervous exhaustion" twice asked the court to discharge the jury. His request was

actually an earnest plea, which the judge ignored—this in the face of knowledge of the juror's illness. Nothing was stated at that time by the judge about the juror having been so ill as to require medical attention. If he would have offered counsel an opportunity to inquire whether juror could go ahead. Usually, even in an emergency, the courts call counsel and apprise them of the situation and receive their consent or disapproval.

The failure to do so deprived the defendant of rights guaranteed by the Fifth and Sixth Amendments of the United States Constitution.

Snyder v. *Massachusetts, supra;*
Hopt v. *Utah,* 110 U. S. 574, 578, 579.

The fundamental right of an accused to be present at every stage, especially in Capitol cases, has been stressed by judicial expression.

Snyder v. *Massachusetts,* 290 U. S. 606, 90 A. L. R. 575;
Hopt v. *Utah,* 110 U. S. 574;
Schaub v. *Berggren,* 143 U. S. 444, 448.

The rule may be stated under the Fifth Amendment, the same as the Fourteenth Amendment, that an accused has the privilege to be present whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge (*Snyder* v. *Massachusetts, supra*).

The right to know about the condition of jurors who may be too ill to deliberate intelligently or satisfactorily is such a substantial right.

Lewis v. *U. S.,* 146 U. S. 370, 36 L. Ed. 1011;
Dowdell v. *U. S.,* 221 U. S. 325, 330.

On motion for a new trial which was denied it developed that while deliberating, William W. Andrews, the foreman

of the jury, became ill. Mr. Andrews told one of the jurors he could not reach the light. That it was going round in his head (Rep. Tr. p. 5727) all the time, and he was getting filled up on it and could not permit it or something. He said he was getting tired of the whole thing and it was going around in his mind all the time and he could not sleep (Rep. Tr. p. 5728). He sat in the back of the bus; he had been attended by a doctor, Dr. Leo Prager, who diagnosed his case as that of "nervous exhaustion" (Rep. Tr. p. 5709). He said he had not been able to sleep for the last 48 hours (Rep. Tr. p. 5709). He said there was a lot of animosity between him and another juror and he asked that he be placed in the back of the bus so he "won't have to fight with somebody" (Rep. Tr. p. 5711). The doctor gave him a sedative.

No report was made of this occurrence to the defendant or his counsel, the matter was kept completely confidential between the bailiff and the trial judge. Dr. James R. Shaw, Dr. Ignacius Sommers attended another juror, Otillia Younger for an ear trouble, with sharp shooting pains (Rep. Tr. p. 5718). No report was made of this occurrence either to the defendant or his counsel.

Another juror became ill in the jury room, commenced to cry and other jurors went in and gave her smelling salts (Rep. Tr. p. 5739).

The trial judge on motion for new trial, conceded that:

> "from the six people from the Marshal's Office who were in attendance upon this trial, not one of them had ever had any experience with the jury. I asked Judge Harrison if he would lend me the services of his crier. He was the only judge that was here at that time and his crier was the only crier in attendance at the time, and he sent Mr. Sheibe down here to help me out" (Rep. Tr. p. 5748).

The judge said before he was awake on Sunday morning the telephone started ringing and he answered it and it

was Mr. Sheibe. He told the judge Mr. Andrews was ill, what should he do. The judge said:

> "I told him to get the house physician if he could immediately. . . . He reported to me later that some doctor had attended Mr. Andrews and found him nervous and gave him some pills—Phenol-Barbital to take" (Rep. Tr. p. 5769).
>
> *"I did not think to bother counsel with such a thing as that.* It was another the bailiff reported to me about this later juror had some trouble with her ear."

He instructed the doctor to take care of her.

> *"I did not report that to you gentlemen.* There were a great many things" (Rep. Tr. p. 5770).[35]

Defense counsel complained on motion for new trial because the judge had not informed him at the time so that the exact condition of Mr. Andrews could then have been determined, and that such procedure denied substantial rights to the defense (Rep. Tr. p. 5771). The court said:

> "We saw them Monday morning. You saw that argument, in effect almost a quarrel between Mrs. Ziegler and Mr. Andrews" (Rep. Tr. p. 5772).

The judge inferred that foreman Andrews was upset because of personal differences between him and Mrs. Ziegler (Rep. Tr. p. 5772). This did not explain why Mr. Andrews could not see the electric light in his room, *was suffering from nervous exhaustion for 48 hours; and was ready to beat up on somebody.*

When juror Clancy on motion for new trial was pressed to information he had given attorney Morris Lavine after the trial, he became suddenly ill and fainted on the wit-

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[35] In Snyder v. Massachusetts, 291 U. S. 97, this court upheld the right of an accused to be present either in person or by counsel at every stage of a criminal case. See also Rule 43 Federal Rules of Criminal Procedure.

ness stand and had to be carried off and to have the services of two doctors who were in the courtroom, and he was never able to be recalled (Rep. Tr. p. 5772).

Another juror, Mrs. Florence Babb, also became ill in the jury room and threw up (Rep. Tr. p. 5774). And, while, the jurors were deliberating, and unable to agree on the sixth day of deliberation, after they had reported they were hopelessly deadlocked, a Marine Band suddenly started played *patriotic airs in front of the Federal Building* (Rep. Tr. p. 5776). On complaint of the defense counsel, the jurors were taken out another way.

We respectfully submit that the sordid picture of the form and manner and length of the jury's deliberations, the high tension, passion and heat, developed in the jury room, in addition to the weather conditions and all of the surrounding circumstances and the instructions of the court that it was their duty to agree, and to return a verdict after they had twice requested to be discharged, denied to this appellant a fair trial guaranteed by the due process clause of the Fifth Amendment to the Constitution of the United States.

The defendant was denied a fair trial guaranteed by the Fifth Amendment to the Constitution in that, during the deliberation of the jury, one or more jurors became ill and a doctor or doctors were called without any notification at any time during the trial to the defendant or his counsel, and without any opportunity to learn the nature of the illness and whether by reason of such illness such juror or juror's became incompetent to deliberate properly.

The trial judge was particularly careful throughout the trial to require that the defendant be present at every stage of the proceeding, even at the bench when the jury had been excused; yet, when the jury went out to deliberate and before they returned into court stating it was impossible to continue further, a physician was called to attend a juror

or jurors who had become ill during the deliberation, and such attendance was made without any such fact ever being communicated during the trial to either the defendant or his counsel. Had the defendant or his counsel been apprised on Monday morning when the jury returned and stated it was impossible to continue, that on Sunday the foreman of the jury and other jurors had been attended medically by a physician because of the nature of the deliberations, defense counsel would have been in a position to present forceful and cogent evidence to discharge the jury at that time, and also would have been in a position to determine if alternate jurors were required as the result of the illness of one or more of the jurors. Such information, however, was withheld from the defendant and his counsel.

IX

A. The Court Erred in Declining to Poll the Jury as to the Names of the Two Witnesses Who Established the Constitutional Requirement.

When the jury returned into Court after it had sent a message that it had partially arrived at an agreement and had returned its partial verdict, counsel for appellant requested the Court to poll the jury as to the names of the two witnesses whom the jury relied on to establish the overt act. The Court denied the defendant's request. Thereafter it was stipulated that the same request had been made and denied as to each alleged overt act in which agreement was claimed to have been arrived at.

The Court denied the request as to each alleged overt act. It was stipulated that the request might be deemed to have been made as to polling the jury as to every such act.

One of the purposes of polling the jury where special verdicts have been returned in addition to a general verdict is to determine if the general verdict has actually been

based upon the facts as found by the jury. If the special verdict is contrary to the general verdict, a new trial is required.

Inasmuch as there were several witnesses to each of the overt acts it may be that some of the jurors believed that two certain witnesses proved the particular overt act while some of the jurors believed that two different witnesses proved the overt act. With this uncertainty in the record it is impossible to ascertain if the defendant has been convicted by the two witness requirements of the Constitution.

This was highly prejudicial error.

Where the only crime mentioned in the Constitution is specifically defined and the quantum of evidence that is required is therein specified (Art. III, Sec. 3, U. S. Constitution), and the court has requested special verdicts which do not sufficiently establish the constitutional requirement, a request to poll the jury specifically to determine if there has been unanimity or sufficient proof is necessary. Where, as here, there have been several witnesses to the alleged overt act or parts of the alleged overt act, one juror might have believed one witness but disbelieved another, and another juror vice versa. What the Constitution requires is unanimity by the jury as to the same witnesses to the alleged overt act and that these same witnesses be at least two in number to the whole of the overt act, or the same two in number to such parts of the alleged overt act as would form a chain in the whole of the overt act.

Cramer v. *United States*, 325 U. S. 1, 89 L. Ed. 144;
Haupt v. *United States*, 330 U. S. 631, 91 L. Ed. 1145.

It was the right of the defendant to have the court poll the jury to determine if this quantum of evidence had actually been relied on by the jury so as to determine if the general verdict was actually based upon the special findings of the jury as to unanimity.

X

The Return of the Jury Without a Unanimous Verdict on the Whole of the Indictment as Alleged Was Necessary Unless the Government Withdrew the Overt Acts Before Submission to the Jury.

The indictment in this case alleged a continuation of the treason from October, 1944 until August, 1945.

The prosecution withdrew one overt act and the court dismissed another overt act, but there was no withdrawal of the other overt act. Therefore, it was necessary for the prosecution to prove the essential elements of the indictment as laid and its continuous character so alleged in the indictment as to each and all of the acts. It was, therefore, mandatory for the jury to return a verdict as to the whole of the indictment which had not been withdrawn, or the result was necessarily a disagreement by the jury. Proof of parts of the overt acts did not prove the indictment as laid and as submitted to the jury.

When the jury reported finally after nine days of deliberation that they were ready to return into court and stated that they had arrived at an agreement as to some of the overt acts, the court requested the prosecution if it wished to withdraw some of the overt acts. The Government did not do so. Thereafter the jury was permitted to return the indictment as submitted to the jury without the withdrawal of any of the overt acts.

It is respectfully submitted that the jury was at that time a disagreed jury and not an unanimous jury to the indictment as specified.

Andres v. *U. S.*, 333 U. S. 740.

XI

The Case Actually Resulted in a Mistrial

Although the jury returned a general verdict in this case, there were several special verdicts submitted to them for their consideration. It was therefore the right of the

defendant to have a unanimous decision by the jury on each of the special findings submitted to them. Failure to find on those special issues—one way or another—resulted actually in a hung jury.[36]

When the jury returned into court for further deliberation, the appellant demanded that the jury be returned for further deliberation and for final determination of the issues. The court asked the jurors if they wished to return and they stated they did not. There were five issues left without any agreement or without returning any verdicts thereon. We submit that this resulted in a hung jury and that the court, therefore, had no right to discharge the jury under such a situation.

In *Andres* v. *United States*, 333 U. S. 740, 92 L. Ed. 1055, 333 U. S., page 748, the court said:

> "Unanimity in jury verdicts is required where the Sixth and Seventh Amendments apply" (See *American Pub Co.* v. *Fisher*, 166 U. S. 464, 41 L. Ed. 1079).
>
> "In criminal cases this requirement of unanimity extends to all issues—character or degree of the crime, guilt and punishment—which are left to the jury. A verdict embodies in a single finding the conclusions by the jury upon all the questions submitted to it."

In Justice Frankfurter's concurring opinion in *Andres* v. *United States*, 333 U. S. 763, the court said:

> " 'Until the twelve judges have agreed on every part of the verdict they have not agreed on any verdict' (*Id.* 287 N. Y. at 171, 38 N. E. 2d 482, 138 A. L. R. 1222)".

[36] At the time the jury came in the defendant objected to the discharge of the jury without reaching a unanimous agreement to the remaining special verdicts as to alleged overt acts (e), (f), (h), (l), and (o). The court inquired of the jurors whether they believed they could reach a verdict by further deliberation as to said special verdicts and the jurors state "they do not," no juror stating that he desired to deliberate further. [Clk. Tr. p. 3(a).]

It must be seen that the Court left the question of going back to deliberate further to the jury, and did not withdraw any of the overt acts named.

It is respectfully submitted that when the jury so reported to the court, the court should have sent them back to determine every other issue of the case—either affirmatively or negatively—and that its failure to do so actually resulted in a hung jury in this case.

Andres v. *United States*, 333 U. S. 740.

The discharge of the jury over the objections of the defendant and without an agreement, therefore, constituted jeopardy which actually constituted an acquittal in this case.

XII

When the Trial Court Therefore Discharged the Jury Without Consent of the Defendant and Over His Objections Before a Unanimous Verdict Had Been Reached on Each of the Issues Was in Fact an Acquittal.

Ex parte Lange, 18 Wall. 872;
People v. *Webb*, 38 Cal. 476;
People v. *Hunckler*, 48 Cal. 331.

XIII

The Trial Court Erred in Denying the Defendant the Right to Inspect the Minutes of the Grand Jury and the Right to Question the Foreman of the Grand Jury Regarding the Return of the Indictment.

At the outset of the case, an effort was made to determine whether the indictment had been returned on sufficient evidence; that is to say, on the testimony of two witnesses to an overt act. [Rep. Tr. June 27, 1947, pp. 38 *et seq.*] This was partly occasioned by reason of the fact that the complaint against the petitioner before the United States Commissioner was based on an affidavit of hearsay information solely of F.B.I. Agent Sawtelle, who had never been in Japan. The trial court denied the motion to inspect

the minutes of the Grand Jury, and refused to allow the foreman of the Grand Jury to be questioned.

Rule 6 of the Rules of Criminal Procedure, however, adopted by the Supreme Court of the United States, permit a jury to be questioned,

> "upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury."

The Fourth Amendment to the Constitution of the United States provides as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Therefore, the accused has the right to question the legality of his arrest and whether there is any probable cause for his seizure. The constitutional requirement of *two* witnesses to an overt act in furtherance of an intent to betray is essential.

The mere statement of an F.B.I. Agent and an affidavit on information and belief would not be sufficient.

Furthermore, since a superseding indictment was brought, it was a different indictment and requires the same kind of evidence as did the former indictment. And, the indictment required at least twelve votes for all who heard all of the testimony relating to the alleged crimes. Since an indictment had been returned, there was no reason for secrecy surrounding these events and the Rules of Criminal Procedure specifically permit such an inquiry.

Kawakita had been arrested without a warrant. The only complaint filed against him was by an F.B.I. Agent.

The arrest could not be justified nor could a Grand Jury indictment be justified if it was without probable cause.

United States v. *Di Re*, 332 U. S. 581; 92 L. Ed. 210.

Kawakita had not been told why he was arrested in accordance with the requirement of California State Law. (See Section 841, California Penal Code; *United States* v. *Di Re*, 332 U. S. 588; *Bad Elk* v. *United States*, 177 U. S. 529.)

We challenged the arrest, in the courts below, as illegal. [R. 2954.] Thereafter, Kawakita was taken to the Bureau and held for two hours before being arraigned before a Magistrate. He was thereafter questioned and made a statement to F.B.I. Agent. The statement itself was not introduced in evidence. [R. 4244-59; 4384-8.]

The Court over objections of the defendant, permitted the Government to cross-examine the defendant from the statement thus secured, and to impeach him in the trial from the illegally gotten statement, which was done over objection and violated the defendant's constitutional rights under the Fourth and Fifth Amendments to the Constitution of the United States. [R. 4242, 4254, 4263 J.] The Court overruled the objections.

XIV

The Trial Court Erred in Permitting Fourteen Jurors to Sit Throughout the Trial of the Case

The appellant, at the outset, challenged the right to have two alternate jurors set in the case. Juries in the courts of the United States are tried according to the principle of common law.

The conception of trial by jury in our Anglo-American system is so that certain elements have long been regarded as of its essence.

1. The term jury denotes a body of twelve—no more and no less. Learned judges have, indeed, sometimes permitted themselves to say that Magna Carta guaranteed the right to trial by twelve jurors. (*Thompson v. Utah*, 170 U. S. 343, 349, 42 L. Ed. 1061.) At the beginning of the Thirteenth Century, twelve was indeed the usual but not the invariable number. (Thayer, Evidence, 85.)[37]

Trial by jury is a trial by twelve men, no more, no less—not fourteen.

Capital Traction Co. v. *Hof*, 174 U. S. 873, 43 L. Ed. p. 881.

The selection of two alternates makes the jury fourteen and not twelve. It is idle to say that these two extra persons associating as they do with the other twelve, do not discuss evidence or other matters and do not have a weighty influence on the jury. Jurors are human and the whole issue must be left to but twelve jurors.

It was therefore error not to refuse to discharge the two alternate jurors and to maintain a jury of fourteen throughout the trial.

XV

The Court in Considering Punishment Apparently Was Influenced by Matters of Which There Was Absolutely No Evidence and Which Were Argued Previously on the Motion for a New Trial.

The Court said:

"Like Hans Haupt, the defendant in Haupt v. United States, 330 U. S. 631 (1947), the defendant

[37] The importance of the number is dwelt upon by Lord Coke, who says: "And it seemeth to me that the law in this case delighteth herself in the number of twelve. . . . The number of twelve is much respected in Holy Writ, as twelve apostles, twelve stones, twelve tribes, *et seq.*" Cole. Litt. 155 A. See also Somers, The Security of Englishmen's Lives, 94 (Harvard Law School 1126, Jefferson Works 5102).

gave every aid and comfort to the enemy that he was able to give. And the evidence compels the conclusion that what the defendant was able to do, with his brutal, slave-driving tactics, added many tons of nickel ore to Japan's war effort that would never otherwise have been mined or smelted by American prisoners of war." [Rep. Tr. p. 5825, lines 6-13.]

This was certainly a fallacious conclusion. The only acts relating to the defendant adding any tons of nickel ore to Japan's war effort were not involved in this case. Not a single overt act found by the jury established that Kawakita added a single ounce of nickel ore to Japan's war effort. As we have heretofore pointed out, five of the alleged overt acts were in aid of the Military in punishing Americans for crimes committed against laws of Japan and against the military authorities in the prisoner of war camp and at a time when Americans were no longer working in the mine. Another was in compelling a man to work who was not working. The other was in carrying a second bucket of paint. The other act was in not rendering medical aid and the other act was also a punishment act.

If there was any evidence that Kawakita added one ounce of nickel ore to Japan's war effort, we have failed to find it. That was the government's theory at the outset of the case in bringing the charges. But, when it appeared that the defendant had been drafted to work in the Camp, this fact disappeared from the case and Overt Acts (m) and (n), on which these charges were based, were withdrawn. Nevertheless, it seems still to inhere in the court's mind at the time of the consideration of the Motion for a New Trial and was referred to indirectly at the time of judgment and sentence. The judgment was indeed arbitrary and capricious and not founded on a single fact present in the case.

That the court, therefore, took into consideration in pronouncing the death sentence a fact not proved requires the arbitrary judgment to be set aside.

XVI

The Trial Judge Erred in Its Arbitrary Imposition of the Sentence of Death Upon the Appellant

The judge's reason for imposing the death penalty is expressed by him [Rep. Tr. p. 5856], as follows:

> "If this defendant were to go from this court a free man, he would be condemned to live out his life in bitter scorn of himself. . . . These thoughts, and others, many of which were mentioned by you, Mr. Lavine, must tell the defendant that his life if spared would not be worth living. Considering the inherent nature of treason and the purpose of the law in imposing punishment for the crime, the reflection leads to the conclusion *that the only worth-while use for the life of a traitor such as this* defendant has proved himself to be is to serve as an example to those of weak moral fiber who may hereafter be tempted to commit treason against the United States." [Rep. Tr. p. 5857.] (Italics ours.)

The judge then imposed judgment.

In fixing the punishment for treason Congress apparently did not agree with the trial judge. Neither did the framers of Constitution. The latter did not put any punishment in the Constitutional definition of treason. Mr. Justice Jackson, in *Cramer* v. *United States*, 325 U. S. 1, 24, said:

> "Distrust of treason prosecutions was not just a transient mood of the Revolutionists. In the century and a half of our national existence *not one execution on a Federal treason conviction* has taken place. Never before had this court had occasion to review a conviction." (Italics ours.)

And, in a footnote of *Cramer* v. *United States*, 325 U. S. 1, 14, the court pointed out that every member of the Constitutional Convention "could have been prosecuted and might have been convicted as 'traitors' under the British Law of constructive treason. It was in this setting that Congress adopted the law of Treason and the punishment for it, fixing it at not less than five years and the maximum of death. The Congress of the United States in its legislative policy and our own history is contrary to the arbitrary finding of the judge that the lawmakers fixed the policy that

> "the only worth-while use for the life of a traitor is to serve as an example to those of weak moral fiber who may hereafter be tempted to commit treason against the United States."

Such arbitrary action is a condemnation of the Legislative policy by the Congress of the United States and the historical policy of the United States in treason cases. It is arbitrary and capricious.

In the *Cramer* case, which was later set aside, the judge fixed the punishment at 45 years. In the *Haupt* case the judge fixed the penalty at life. In the *Tokyo Rose* case the judge fixed the penalty of ten years. In the *Chandler* case the court fixed the penalty of life. And, in the "*Axis Sally*" case in Washington the court fixed the punishment for fifteen years.

As said by the Court in *Cramer* v. *United States*, quoting from Payne:

> "He that would make his own liberty secure, must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach himself. We still put trust in it."

Conclusion

TOMOYA KAWAKITA went to Japan as a boy, full of ambition to learn and improve himself. He was caught in the maelstrom of a great war. To paraphrase the language of *Chandler* v. *United States,* his acts were performed under war time stress and duress; he was drafted by the foreign government as one of its citizens, and he was under enemy compulsion. In order to earn a living, he accepted employment for which he was later drafted "in these days of total war." In *Chandler* v. *United States,* 171 F. 2d at page 945, the court said:

> "The present case involves no problem of acts of *aid and comfort performed under enemy duress.* Chandler was not under enemy compulsion; upon the contrary it was he who sought employment with the Short Wave Station. Nor does the present case necessitate any detailed examination as to how far an American citizen, *caught in an enemy country at the outbreak of war,* may, *in order to earn a living* and without the stigma of treason, accept employment which in these days of total war might conceivably be of some aid in the enemy war effort. Here, as elsewhere in the law, there may be troublesome questions of degree."

In this setting Kawakita was not guilty of any treason at all. As a Japanese citizen, he owed total loyalty to the Government of Japan, which was giving him its protection and of whose citizenship he was one.

The overt acts, in their setting, were trivial. We believe the accounts of the men were exaggerated, and contradictory and unsubstantial. Of a total period of one year covered by the indictment, the government was only able to find fifteen trivial acts of which they thought sufficient to base an indictment upon. Most of them were punishments imposed by the military authorities in its conduct of

the camp under international law; two were withdrawn; five others were not found by the jury, and eight were found against the defendant by the jury. None of them showed a treasonable project. The crowning piece of allegation of treason was that Kawakita caused a man to carry two buckets of paint when the man was only carrying one bucket—at a time when he was supposed to be carrying two buckets of paint.

For these alleged trivial "overt" acts, in this untreasonous setting, the trial judge imposed the *death* penalty.

In the setting there was no treason.

We respectfully pray for reversal on each and all of the grounds set out in this brief, and for an order directing a discharge of the defendant.

Respectfully submitted,

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BRIEF FOR THE U.S.

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No. 570

In the Supreme Court of the United States

OCTOBER TERM, 1951

TOMOYA KAWAKITA, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 570

TOMOYA KAWAKITA, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Appeals (R. 521–558) [1] is reported at 190 F. 2d 506. The opinion of the District Court denying a motion for a judgment of acquittal or in the alternative for a new trial, and a separate motion for arrest of judgment, is reported at 96 F. Supp. 824.

JURISDICTION

The judgment of the Court of Appeals was entered June 22, 1951 (R. 559), and a petition

[1] The original record certified by the clerk is designated as "R."; the reporter's transcript of 47 volumes is designated as "Tr."

for rehearing (R. 560–584) was denied September 24, 1951 (R. 586). On October 16, 1951, Justice Douglas extended the time for the filing of a petition for a writ of certiorari to November 23, 1951. The petition was filed on November 21, 1951, and was granted on February 4, 1952. The jurisdiction of this Court rests on 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

The principal questions presented are:

1. Whether the evidence supports the finding of the jury that petitioner had not renounced or lost his American citizenship and that he owed allegiance to the United States at the time of the commission of the acts charged in the indictment.

2. Whether the overt acts alleged in the indictment were acts of aid and comfort to the enemy.

3. Whether there was sufficient two-witness evidence of the overt acts and sufficient evidence of intent to betray.

4. Whether statements to F. B. I. agents, made by petitioner after his arrest, could properly be used for purposes of impeachment.

5. Whether it was coercion of the jury to give the so-called "Allen" instruction after the jury had deliberated 20 hours and announced inability to reach a verdict.

6. Whether the sentence of death is reviewable as arbitrary or excessive.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Article III, Section 3 of the Constitution:

> Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

18 U. S. C. (1946 ed.) 1:

> Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason.

Pertinent portions of the Nationality Act of 1940, 8 U. S. C. 501, are set out in the Appendix, *infra*, pp. 98–101.

STATEMENT

Petitioner was tried and convicted in the District Court for the Southern District of California for treason in adhering to the enemy (Japan), giving it aid and comfort. The indictment charged that petitioner, a citizen owing allegiance to the United States, while acting as interpreter for a Japanese mining company which employed American prisoners of war to produce war materials for Japan, brutally abused American prisoners of war and by doing so assisted the Japanese Government to utilize these prisoners to produce war materials and assisted the Japanese military

authorities in rendering said prisoners abjectly subservient. Fifteen overt acts were alleged, almost all of which consisted of acts of brutality against United States prisoners of war in Japan, some for the specific purpose of immediately forcing more work from them. (R. 2–9.) Two acts were withdrawn; the jury made affirmative special findings as to eight overt acts a, b, c, d, g, i, j, k), and disagreed as to the others (R. 383–421; Tr. 5669–5670). Petitioner was sentenced to death (R. 452). On appeal, the judgment was unanimously affirmed (R. 559).

Petitioner's factual statements throughout his brief are put in the light most favorable to him, despite the general and special verdicts of guilty, and in large part are predicated on his own self-serving testimony which the jury may have disbelieved in whole or in part. On the other hand, the evidence which the jury could or must have credited in convicting him may be summarized as follows (together with some of petitioner's own testimony):

A. *Petitioner's nationality and employment at Oeyama.*—Petitioner was born at Calexico, California, on September 26, 1921. Both of his parents were born in Japan and were citizens of that country. (Ex. 1, Tr. 87.) Petitioner was thus a citizen of the United States by birth, and a national of Japan (under Japanese law) by virtue of his parentage (see deposition of the Attorney General of Japan, Tr. 4003–4005).

On June 23, 1939, petitioner, who was 17 years of age, was taken to Japan by his father to visit his grandfather (Tr. 4040–4041). For this purpose, he obtained a United States passport, taking the usual oath of allegiance in the process. In June 1940, petitioner registered with the American consul as an American citizen (Ex. 2, Tr. 90). At that time he was told by the clerk at the consulate that he had dual citizenship (Tr. 4229).

Petitioner's father returned to the United States (Tr. 3992, 4041), but petitioner remained in Japan to continue his studies. In March 1941, he entered Meiji University, taking a commercial course and military training (Tr. 4042). In April 1941, he renewed his United States passport, again taking the oath of allegiance (Ex. 2, Tr. 90). During this period he was registered as an alien with the local police (Tr. 4053).

War was declared while petitioner was a student at the university (Tr. 4043). Petitioner testified that in March 1943, a policeman stopped him, demanded his identification card, and asked why he was not in the service. He was taken to the police station and asked if his name was ever registered in the family Koseki.[2] He testified that he was told he must decide either to be an alien or a Japanese, and that he could be Japanese by

[2] The Koseki is a family census register, used as the means of identification in Japan. See Blakemore, *Recovery of Japanese Nationality as Cause for Expatriation in American Law*, 43 American Journal of International Law 441, 449 (1949).

having the head of the family enter his name in the Koseki (Tr. 4051–4052); he informed his uncle that he wished to have his name entered and his uncle said it was the best thing to do because of the war (Tr. 4053).

Petitioner testified that he and his uncle went to the city hall to have his name entered in the Koseki (Tr. 4053). The official in charge asked petitioner when he was born and if he desired to enter his name in the family Koseki. Petitioner replied in the affirmative. The entry was made accordingly, and copies of the Koseki given to petitioner. (Tr. 4385–4386.) According to the Attorney General of Japan, entry in the register is not necessary to establish the Japanese nationality, under Japanese law, of a child born to Japanese parents before 1924, but is merely an official certificate that one has Japanese nationality (Tr. 4004).

Despite his course in military training, petitioner did not take advantage of the opportunity open to him to become a Japanese officer (Tr. 4047). He never entered or served in the armed forces of Japan (Tr. 4239).[3] In August 1943, upon completion of his university course, he ob-

[3] Petitioner testified that he did not want to fight against his friends back "home" (Tr. 4047). An affidavit signed by him on December 31, 1945, before the American consul (*infra*, pp. 8–9), states that he was exempted from Japanese conscription "since I had already passed the military age for conscription at the time my name was entered into my uncle's census register" (Tr. 90–91, Ex. 2).

tained employment as an interpreter with the Oeyama Nickel Industry Co., Ltd. (Tr. 4054), and he worked for that company until after Japan's surrender (Tr. 4054–4055, 4147, 4155). The company was a private stock company, organized for profit (Tr. 87, 570–571), which was engaged in processing metals used for war (Tr. 87, 536, 571) under various contracts with the Japanese Government (Ex. 1). In August 1944, the company was designated as a Munitions Corporation under the Japanese Munitions Corporations Law, and as a result, civilian employees of military age were not allowed to change or quit their employment without the consent of the Government (Tr. 487). Petitioner was informed of this requirement (Tr. 536, 4061).[4]

The company utilized the labor of American prisoners of war. Petitioner's acts in relation to such prisoners, which are the overt acts of treason charged in the indictment, are stated below (*infra*, pp. 14–18; see also pp. 11–14). In relation to the issue of petitioner's nationality, it should be noted that in the latter part of 1944 he told prisoners of war that he was going to come back to the United States (Tr. 882–3, 1399–1400), and that in the winter of 1944–45 he told a prisoner that he was an American citizen and wanted to come back to the United States after the war was over

[4] Petitioner testified that only Japanese nationals could work at Oeyama (Tr. 4050, 4053), but there was evidence that two or three hundred Chinese nationals, not Japanese citizens nor prisoners of war, were working there (Tr. 576).

(Tr. 2298–2299, 2339). He told another prisoner, "I will be glad when all of the Americans is dead, and then I can go *home* and live happy" (Tr. 1860, emphasis supplied). In May or June 1945, petitioner said it made no difference how the war went because he was going back to the States anyway (Tr. 2160). In July 1945, he told several prisoners he was going back to the United States because he was an American citizen (Tr. 1166).[5]

On December 31, 1945, petitioner went to the United States consul at Yokohama, and made an application for registration as a citizen. He stated under oath that he was a United States citizen, that he had not been naturalized as a citizen of a foreign state, taken an oath of allegiance to a foreign state, served in the armed forces of a foreign state, or accepted or performed the duties of any office, post, or employment under a foreign state. He swore allegiance to the United States. He explained his protracted foreign residence by stating that he had possessed dual nationality, and had come to Japan for educational purposes. He said he had entered his name in the family register but only under severe pressure because his supply of American funds had been cut off. The consular officer found that he had overcome the presumption of

[5] Petitioner testified that in August 1944 he went to China on a Japanese passport, on business for the Oeyama company (Tr. 4059).

expatriation arising from his residence in Japan after attaining majority. (Ex. 2–E, 2–F, 2–G, Tr. 90–91.) He was issued a passport and returned to the United States in August 1946 (Tr. 4203).

Petitioner was recognized in Los Angeles in October 1946, by William L. Bruce, a former prisoner of war at Oeyama, and reported to the authorities (Tr. 2753–2754, 2772). His indictment and trial for treason followed this disclosure.

B. *Petitioner's general course of conduct at Oeyama.*—The company by which petitioner was employed operated, at Oeyama on the island of Honshu, a nickel or smelter factory, and a nickel mine (Tr. 118–121). As indicated above (p. 7), the nickel produced by the company was used in making special steel for munitions (Tr. 87, 471, 473, 570–571). After August 1944, petitioner knew that the metals produced by the company were being used for war purposes (Tr. 4263).

The prisoner-of-war camp adjoined the nickel factory (Ex. 24; Tr. 119) and was under the control of Japanese military authorities (Tr. 3726). In the center of the camp was an open pool about three feet deep into which ran water draining through various parts of the camp; the water was polluted, stagnant, and stank; it was full of stuff up to the knees of one standing in it (Tr. 117, 690, 1923, 3382). The prisoners of war referred to it as a cesspool (Tr. 1923).

The mine was located about 10 or 12 miles to the southwest of the factory and was connected with the factory area by a railroad spur (Tr. 120). It was a surface mine on a mountain side with various levels. The American prisoners of war dug ore and dumped it into hoppers (Tr. 122–125, 219). They were also used to carry heavy logs of from 300 to 500 pounds, used for construction purposes (Tr. 190), and for all incidental labor in the mine area (Tr. 161). They were given their midday meal in a mess hall at the mine and were allowed a short midmorning break at small rest houses (Tr. 125–126, 141–143). Winter weather prevailed at Oeyama from the middle of December until April; snow remained on the ground practically all winter (Tr. 136).

The American prisoners of war at Oeyama, most of whom had been captured at Bataan, were in weakened condition at the time of their arrival in Oeyama, which began in August 1944 (Tr. 109, 3395). All were below normal weight, many were suffering from beri-beri, pellagra, and general malnutrition, and they were prone to suffer from dysentery, diarrhea, colds, and more serious lung diseases. The American medical officer was of the opinion that most of the men were unfit for work, but the Japanese ordered 80–85% of them to work (Tr. 3395). American prisoners who were on "light" duty were assigned to the

factory, rather than the mine. After March 1945, all the American prisoners were assigned to the factory (Tr. 160).

Petitioner was hired solely to interpret communications between the Japanese and the prisoners of war (Tr. 473). The president of the company (Tr. 470, 473, 584), the assistant engineer of the company with whom petitioner lived (Tr. 3721, 3819), and petitioner himself (Tr. 4064), all testified that he had no authority to act in any capacity other than as interpreter. Nevertheless, petitioner, of his own volition behaved in such a manner toward the prisoners of war that he earned for himself the nicknames of "Efficiency Expert" and "Empire Builder" (Tr. 1064, 2779).

Petitioner had been assigned as interpreter for the men working at the mine (Tr. 4057).[6] About October or November 1944, the Japanese authorities raised the quota of carloads of ore expected from the American prisoners from 165 to 200 per day (Tr. 165–166, 3733, 3740). As an almost every day occurrence, petitioner swore at the American prisoners of war and harped at them for failing to fulfill the quota (Tr. 168, 173–174, 600, 713, 722, 964, 1184, 1211–1212, 1334–6, 1407, 1777, 2433), usually accompanying his words with blows

[6] Petitioner testified that he dealt only with enlisted men, and "was not with the officers until the end of the war" (Tr. 4211).

(Tr. 795, 1066, 1211, 1335, 1401, 1402, 1407–1408).[7] He told the men that if they didn't work they would suffer (Tr. 1277) and threatened to take away all rations from those who couldn't work (Tr. 654). On a number of occasions, he drove the men to work out of the rest house, before the rest or meal period allotted to them had ended (Tr. 1080–1081, 1158–1159, 1333, 1701–1704, 2048, 2437). He hit over the head and drove to work one prisoner who had been sent to rest by his Japanese supervisor (Tr. 428–431, 443) and, on another occasion, similarly sent out to work another prisoner who had been allowed to rest (Tr. 1983–4). When one of the prisoners told petitioner that the men were too weak to work, he replied, "Don't worry; there are more boys where they came from" (Tr. 722). He suggested to the commandant that if rations for patients were cut, more of them would go to work (Tr. 1496–1497). He told the prisoners that if they would raise their work quotas, they would be getting more food (Tr. 726–7) and that the quotas were too low and should be raised (Tr. 1780). On one occasion, petitioner told the Japanese foreman that the prisoners had not been doing enough work and should be punished (Tr. 1822–1827). On another, he took away the noonday meal of a prisoner who had reported sick, saying "Anybody

[7] Petitioner also engaged in acts of physical brutality unconnected with work (and aside from the overt acts) (see Tr. 789–790, 1160, 1474–5, 1714–1715, 1836–7, 1956–8, 1861, 2757).

who is too sick to work is too sick to eat" (Tr. 2218). He hit a prisoner who was smoking a cigarette given him by a Japanese supervisor with the remark that all the prisoner was supposed to do was work for the Japanese people (Tr. 2766–2767), and at another time slapped some nuts (which had been given by a Japanese guard) out of his hands and told him he would be sorry for going into the woods and getting nuts when he should have been working (Tr. 2757–2761).

Petitioner testified that he felt no loyalty to the United States while he worked in Japan, until he applied for a United States passport (Tr. 4227, 4234), and that he intended to do everything he could to help Japan (Tr. 4227). He taunted the prisoners with the fact that General MacArthur had left the Philippines (Tr. 648). He told them Japan was winning the war, elaborating with such details as that San Francisco had been bombed and that all the American planes and ships on the Pacific had been destroyed (Tr. 791, 1344, 1777). He said Japan would win the war, no matter how long it took (Tr. 790–1, 881–2, 1510) and that the prisoners would never get out of the camp alive or would stay for 50 years or would have to stay and work for Japan (Tr. 962, 1166, 1334, 1400, 1705–6). In 1944, he said he was going back to the United States as a "big shot" after Japan won because he knew the language (Tr. 882–883, 1166, 1400, 1706, 1777, 2047), but in May or June 1945 he said he didn't care how

the war went since he was an American citizen and was going back to the States (Tr. 2160).[8]

C. *The overt acts.*—The specific overt acts on which petitioner was found guilty, and the evidence with respect thereto, may be summarized as follows:[9]

Overt act (a) alleged that, in May 1945, petitioner kicked a prisoner named Toland who was ill with malaria, because he slowed down in his work of lifting ore rocks from the tracks at the factory to keep the tracks clear. Five witnesses testified to this incident (Tr. 728–730, 791–794, 1082–1084, 1402–1403, 1643–1645). Toland, who

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[8] Petitioner hit prisoners when they praised the United States over Japan (Tr. 1857, 1861), and on one occasion had two prisoners thumb their nose in the direction of the United States (Tr. 1858). He frequently expressed his hatred and hostility toward the prisoners as Americans and toward things American. See Tr. 648, 1332–1333, 1386 (Red Cross supplies as "American garbage"), 1474–5 ("They [the United States] never gave me a damn thing"), 1510 ("the Japanese were far superior to the American people"), 1642 ("I wish you were all dead"), 1860 ("I will be glad when all the Americans is dead, and then I can go home and live happy"), 2048 ("you lazy Yanks"), 2221 ("You American bastards will be well fed"—after VJ day).

[9] A sample of the eight interrogatories which the jury answered affirmatively as to each of the eight overt acts is reprinted in 96 F. Supp. 851–852. Copies of all 64 special interrogatories answered by the jury are given in the Appendix to the Government's brief in the Court of Appeals, pp. 180–216) (Appendices to Brief for Appellee, Volume II, *Kawakita* v. *United States of America*, C. A. 9, No. 12,061). Copies of this Appendix have been lodged with the Clerk, for the convenience of the Court.

had malaria, suffered a dizzy spell and slowed down. Petitioner told him to get to work and kicked him. He fell flat, and cut his face and palm. Another prisoner wanted to pick Toland up, but petitioner would not let him do so.

Overt act (b) alleged that, in the latter part of April 1945, petitioner participated in the inhuman treatment of J. C. Grant, an American prisoner of war. Grant had been seen by a Japanese sentry coming out of the Red Cross storeroom with a package of cigarettes. He was thrown into the cesspool by a Japanese sergeant, ordered out and knocked back repeatedly (Tr. 1916–1918). Petitioner arrived with a working party (Tr. 1919). While Grant was in the pool, petitioner and two Japanese hit him over the head, petitioner using a wooden sword and telling him to squat down, trying to force him to sit down in the water (Tr. 368, 889, 1089, 1405, 1513, 1647, 1719, 1782, 1986, 2050–2052). When Grant was taken out of the pool, he was blue, his teeth were chattering, and he could not straighten up (Tr. 890, 1720, 2052). Petitioner was laughing during the incident (Tr. 889, 1090, 1406, 1516, 1719, 2052).

Thirteen witnesses testified to the incident (Tr. 366–369, 886–891, 965–968, 1084–1090, 1161–1162, 1404–1406, 1510–1518, 1645–1648, 1718–1720, 1780–1782, 1915–1921, 1984–1987, 2049–2052). They did not agree as to whether the day was in April (Tr. 965, 1085, 1404, 1718, 2049) or May (Tr.

367, 886, 1511, 1645, 1984), or as to the exact time between 4 and 6 p. m., or as to all the details, but all (other than Grant) remembered that petitioner kept hitting Grant with his saber while he was in the pool (*supra*).

Overt act (c) charged that, in December 1944, petitioner and Japanese guards lined up about thirty prisoners and, as punishment for making articles of clothing out of blankets, struck them and forced them to strike each other. Seven witnesses testified to this incident (Tr. 731–739, 1091–1096, 1337–1342, 1519–1524, 1838–1842, 2052–2057, 2540–2545). Petitioner hit prisoners who, he thought, did not hit each other hard enough (Tr. 738–739, 1095–1096, 1523, 1842, 2544).

Overt act (d) charged that in August 1945 petitioner imposed punishment on one O'Connor by knocking him into the pool, causing O'Connor temporarily to lose his reason. Six witnesses testified (Tr. 595–597, 968–972, 1525–1531, 2100–2107, 2438–2444, 2546–2550). The prisoner, who was sick, had stolen Red Cross supplies. He was knocked into the pool by Japanese soldiers, and then repeatedly hit and thrown back by them and by petitioner.

Overt act (g) charged that, in July or August 1945, when a work detail returned early, a Japanese sergeant compelled them to run around a camp building; petitioner forced two of the men, who were unable to run fast enough because of

illness, additionally to run around the building four and six times respectively. Eleven witnesses testified to the facts substantially as alleged. When the men slowed down, petitioner threw pebbles and sod at them. (Tr. 174–183, 369–372, 1214–1217, 1285–1288, 1342–1345, 1476–1477, 1532–1534, 1843–1845, 2248–2259, 2344–2351, 2444–2448.)

Overt act (i) alleged that, in December 1944, at the mine, petitioner ordered a prisoner named Carter to carry a heavy log up an ice-covered slope; that when Carter slipped, fell, and was injured, petitioner delayed his removal to the camp for approximately five hours. The evidence showed that ore trains ran from the mine to the smelter during the day (Tr. 905–906), and that petitioner had been told by an American medical corpsman that Carter was badly hurt and needed attention (Tr. 905–907, 662, 1850). Four witnesses testified to petitioner's conduct (Tr. 660–662, 901–910, 1846–1849, 1850–1854, 2160–2165).

Overt act (j) charged that, in May 1945, petitioner struck a prisoner named Armellino, who was weak and emaciated, to make him carry two buckets of lead instead of one. Armellino was working at the camp, moving inflammables from one warehouse to another. He had had double pneumonia some months before (Tr. 1213) and was carrying only one bucket. Petitioner placed another bucket in Armellino's arm and struck

him. Armellino fell. When he got up, petitioner forced him to carry two buckets, pushing him along. Two witnesses testified to the incident (Tr. 594–595, 1217–1221).

Overt act (k) charged that, in the spring or summer of 1945, petitioner participated in the inhuman punishment of a prisoner, Woodrow Shaffer, by forcing him to kneel on bamboo sticks on a platform, with a bamboo stick inside the joints of his knees, and his arms above his head holding a bucket of water. When the prisoner would become tired and bend his elbows, petitioner struck him; when he leaned over and spilled some water, petitioner would take the bucket, throw the water on the prisoner, and have the bucket refilled. Subsequently the prisoner was told to hold up a log, but the log fell on him, causing a gash. After it was treated, petitioner placed sticks on the ground, and again made the prisoner kneel in the same fashion. Eight witnesses testified to this act. (Tr. 1096–1101, 1162–1165, 1346–1348, 1535–1542, 1720–1725, 2057–2061, 2459–2461, 2551–2557).[10]

SUMMARY OF ARGUMENT

I

Petitioner, a dual national at birth, could have renounced his American nationality while residing

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[10] The facts bearing on the jury's deliberations and the supplemental instructions, after the case had been submitted to the jury, are set out in Point V, *infra*, pp. 81–86.

in Japan during wartime. Had he done so, he could not have been prosecuted for treason. The theory on which this case was tried was that petitioner, while adhering to Japan, giving it aid and comfort beyond the obligations of his employment, nevertheless did not renounce or lose his American citizenship. He sided with Japan when he thought Japan was winning, but held on to his American citizenship for what it might be worth, and after the war used his American citizenship to return to this country. Such conduct is treachery.

A. Under proper instructions, the jury found, and it is a fact, that petitioner did not renounce or lose American nationality by any of the methods specified in the Nationality Act of 1940. He did not enter or serve in the armed forces of Japan. He did not hold a position under the government of Japan for which only nationals of such state were eligible. He was employed by a private corporation operated for profit. The fact that sometime after he took employment he was "frozen" in his job did not transform his private employment into government office.

Petitioner's entry of his name in the family census register was not an "affirmation or other formal declaration of allegiance" under Sec. 401 (b), 8 U. S. C. 801 (b), nor naturalization in a foreign state under Section 401 (a), 8 U. S. C. 801 (a). The entry was merely an open dis-

closure of an existing fact, that petitioner had Japanese nationality and had had it since birth.

B. We do not believe that an American citizen can lose his nationality by evincing the election of another nationality in a method not set forth in the Nationality Act of 1940. The Nationality Act was drafted for the specific purpose of clarifying the law of nationality, and must be deemed "a self-contained, exclusive procedure." Cf. *Bindczyk* v. *Finucane*, 342 U. S. 76, 83. The legislative history shows that a provision, requiring election by a dual citizen taken during minority to the country of his other nationality, was omitted from the bill because the drafters were unable to agree that such a provision was desirable. Since the Act did not merely codify existing law, but created new grounds for loss of nationality, and since Sec. 402 (8 U. S. C. 802) of the Act deals specifically with those having dual nationality, at birth or otherwise, we think the omission of a requirement for election by dual nationals at birth cannot be deemed a decision to leave the matter open for judicial determination. Moreover, Section 408, 8 U. S. C. 808, provides that the means of expatriation prescribed in the Act shall be exclusive.

In any event, the principle of election would not affect this case. The jury was instructed that petitioner had to be acquitted if he honestly believed he had renounced or lost American na-

tionality. Under the circumstances of this case, the finding of the jury, that petitioner did not believe that he had renounced or lost his United States nationality, is necessarily a finding that he had not elected Japanese nationality to the exclusion of United States nationality.

Petitioner did not reach majority until 1942, when the war made it impossible for him to return. And even where the doctrine of election applies, a reasonable time (which may be two or three years) is normally allowed for return. Under this combination of circumstances, the mere failure to return until 1946 would not be deemed an election of Japanese nationality. Neither would the other acts on which petitioner now relies, such as his claimed use of a Japanese passport in 1944 (there obviously being no opportunity to obtain an American one), or his entry of his name in the family register. In the particular circumstances of the war, there could not be an election of Japanese nationality by some means not specified in the Nationality Act without proof that petitioner intended thereby to renounce United States nationality. The jury found that he had no such intention.

The evidence amply supports the finding. Petitioner went to Japan as an American citizen on an American passport, which he renewed in 1941; immediately after the war he came back to the United States as an American citizen on

an American passport. At that time, he swor that he was an American and had not performe acts of expatriation. His parents were in th United States, and he spoke of the United State as "home". Even during wartime, when he wa aiding Japan, he sometimes spoke of himself a an American citizen. He carefully did not joi the Japanese army or take a government job, act which would have expatriated him.

C. So long as petitioner did not renounce o lose his United States nationality, he owed alle giance to the United States and can be punishe for treasonable acts voluntarily committed. Th fact that he was a dual national from whom Japa claimed permanent allegiance under Japanese law does not nullify petitioner's American allegiance under American law. In retaining United State nationality, petitioner surely retained at least th obligation not to adhere to the enemy beyond th duties imposed upon him by the law of his resi dence.

The trial court instructed the jury that peti tioner was not to be convicted for acts required of him under his employment or acts performed because of other coercion. Petitioner was thu unequivocally excused for conduct required o him under the law of Japan or by his employ ment. His conviction for treason is based on hi voluntary acts, born of the zeal with which, when he thought Japan was in the ascendancy, he ad

hered to the Japanese cause. Such acts were manifest violations of the minimum allegiance which, as a citizen of the United States, petitioner owed to the United States.

II

Petitioner, by his conduct, gave aid and comfort to the enemy, and the overt acts with which he was charged were overt acts of treason.

A. There is no merit in his apparent argument that, because his conduct was in violation of the Geneva Convention by which Japan had agreed to be bound, it was merely in contravention of local law and could not constitute treason against the United States. One very important way to help a belligerent can be through helping it to violate its international obligations. And it obviously cannot be said that since petitioner's conduct may have been in contravention of local Japanese law, no other country has any interest or concern. Whether petitioner's acts were legally authorized or unauthorized under the law of Japan is immaterial in this case. The only question here is whether his conduct was treason under the definition thereof in United States law, *i. e.*, whether he adhered to the enemy, giving it aid and comfort.

B. Nor would it be material if—as petitioner inconsistently seems to claim (contrary to all the evidence)—he had done no more than properly

punish American prisoners of war for violating their duties and obligations as prisoners. Violation by an American of the rules of war governing him does not license another American, acting on the enemy's behalf, to help in the infliction of punishment, with intent to aid and adhere to the enemy. Such conduct would be treason, though it might not be a war crime.

C. Petitioner's acts were of aid and comfort to the enemy. When war exists, any act, however minute, which strengthens or tends to strengthen the enemy is treasonable. *Cramer* v. *United States,* 325 U. S. 1, 28–29; *Ex parte Bollman,* 4 Cranch 75, 125–126. In the setting of this case, petitioner's acts of brutality against prisoners of war were acts which directly tended to strengthen the enemy, since the prisoners were, as petitioner knew, being employed to mine and refine ore to be used for war purposes, and his conduct had the direct tendency to force more work out of them, either immediately or in the longer run.

Two acts (Overt Act (a) and Overt Act (j)) (*supra,* pp. 14–15, 17–18) were directly designed to force more work at the moment. The fact that the single act may in itself have been a small contribution to the ultimate goal is not relevant; each was an act of direct aid to the Japanese effort to force greater production from the prisoners. The acts, moreover, must be judged in relation to the course of conduct proved. As

such, they take significance from their setting, and go beyond merely showing that the enemy was aided and comforted to manifest the treasonable design itself. They are thus clearly more than sufficient acts of treason under the rule laid down by this Court in *Cramer* v. *United States*, 325 U. S. 1.

Even though the other overt acts were not immediately directed toward obtaining more work from the particular prisoner involved, but were acts of brutal punishment for alleged infraction of rules, they were acts of aid and comfort to the enemy. Such acts would tend to instill deep fear into the whole group of prisoners, which would tend to make them more amenable to orders, more subservient, more docile, and thus would aid in forcing them to work. The Japanese, with petitioner's assistance, were obviously trying to bring about the state of mind expressed by one prisoner when he said, "If we wanted to stay healthy, we stayed busy."

In addition, making the prisoners subservient and docile would render them less likely to escape, to help an invading force, to signal American planes, to communicate with our forces in the event of an invasion of the Japanese islands. That is real aid and comfort to the enemy. And the humiliating treatment of American prisoners of war tended to give heart to the Japanese, soldiers and civilians alike, and to create in them a sense of superiority. That, too, is real aid and comfort.

III

The evidence amply supports the verdict. All except one of the overt acts which the jury found proved were testified to by more than the minimum number of two witnesses, required under the Constitution. The fact that the witnesses, who were all direct eyewitnesses, were not specific as to precise date, or as to all collateral details, does not render their testimony constitutionally insufficient.

There was also ample evidence of intent to betray. Petitioner's overt acts, his other acts in evidence, his statements and remarks to prisoners of war showing hostility to this country and its citizens, and his testimony on the stand that during the period in question his only loyalty was to Japan, all established his intent. The jury's finding, under the charge, that his acts were voluntary and not required by his employment negatived all duress and coercion. He acted freely, and out of a purpose to betray.

IV

A written statement, signed by petitioner, as a result of brief questioning by F. B. I. agents after his arraignment, was excluded by the trial judge, despite a finding that it was voluntary, as a matter of policy, because he thought the jury might attach too much weight thereto. The judge did, however, allow the prosecutor, on cross-examination of petitioner, to ask him whether he had not

told the F. B. I. agent that he knew the nickel mined at the factory was being used for munitions of war. Petitioner then testified that he did know such fact after August 1944. Since the exclusion of the statement was merely to protect petitioner, and not the result of a finding of inadmissibility, it was entirely proper to permit such limited use of the statement. Prior contradictory statements may be called to the witness' attention for the purposes of impeachment.

V

The jury was not coerced. Although they reported inability to agree after several days of deliberation (only about 20 hours of which was actually spent in deliberation), it appeared that much of the difficulty arose from personal animosity among some of the jurors. This the judge tried to clear away by a few simple and careful remarks and the so-called *Allen* instruction (*Allen* v. *United States*, 164 U. S. 492, 501–502)—to which he added instructions strongly emphasizing that the verdict must be free, that no juror should surrender his conscientious opinion, and that there could be no conviction if there was reasonable doubt. The jury then deliberated for three more days. While they asked further clarification, they never again intimated inability to reach agreement on a verdict. Although told that they could convict on the basis of one overt act, they actually made sixty-four special findings as to eight acts,

and disagreed as to five overt acts. These facts amply demonstrate that the members of the jury did not surrender their convictions in order to get home sooner. The courts below were correct in concluding that there is no reason to believe that the verdict was not the result of honest and conscientious agreement, and that in the circumstances—including, as well, the length of the trial, the nature and gravity of the charge, and the number of overt acts and interrogatories—the time spent by the jury was reasonable and did not indicate coercion or impropriety.

VI

The death sentence imposed was within the District Court's statutory discretion and is not reviewable.

ARGUMENT

I

PETITIONER WAS AN AMERICAN CITIZEN WHO OWED ALLEGIANCE TO THE UNITED STATES AND CAN BE PUNISHED FOR TREASON COMMITTED IN JAPAN

Petitioner was at birth a dual national, whose allegiance was claimed by the United States under United States law, and by Japan under Japanese law. Our laws granted him the right to renounce his American citizenship, and provided various ways in which that could be done. Had petitioner chosen to do so while residing in Japan during wartime, he could not have been prosecuted by the United States for treason. The theory underlying

this prosecution, the theory on which the case was submitted to and decided by the jury, was that petitioner, while adhering to Japan and giving it aid and comfort beyond the obligations of his employment at Oeyama, nevertheless did not renounce or lose his American citizenship. He sided with Japan when he thought Japan was winning, but he deliberately held on to his American citizenship for what it might be worth, and did in fact use that citizenship when the war was over to return to the United States to live the life of an American citizen. Such conduct is treachery, properly punished as treason.

A. *The evidence supports the finding of the jury that petitioner had not, at the time of the commission of the overt acts, renounced or lost his American nationality by any of the methods specified in the Nationality Act of 1940.*—1. The trial court charged[11] that it was an essential element of the crime of treason that petitioner be an American citizen owing allegiance to the United States at all times during the period specified in the indictment (R. 306, 360; 96 F. Supp. 840, 849). He defined citizenship, and pointed out that it was stipulated that petitioner was a born citizen of the United States, but that under the law of Japan he was from birth "a

[11] The full charge is set out in the District Court opinion, 96 F. Supp. 824, 837–851. For convenience, since only one copy of the record is available to the Court, parallel citations are given.

Japanese national or subject owing allegiance to Japan" as well (R. 308–310; 96 F. Supp. 840). He defined "dual" nationality, and instructed that "any American citizen of alien parentage may, on becoming of age, renounce his American citizenship, and thus become a citizen of only the country of his parents. The question for you to determine on this phase of the case from all the evidence is whether or not at any time prior to or during the period specified in the indictment, the defendant did renounce or abandon his American citizenship." (R. 310; 96 F. Supp. 840–841.)

He then instructed, in the words of 8 U. S. C. 800,[12] that expatriation is "a natural and inherent right of all people," which may be defined as "the voluntary renunciation of one's citizenship—a voluntary act done with intent to renounce or forswear allegiance to the country of one's birth. * * * And it is the policy of our law to permit free exercise of the right of expatriation by all American citizens everywhere." (R. 312; 96 F. Supp. 841.)

He further charged that, under the Nationality Act of 1940, Americans can expatriate themselves during wartime, but only in the manner provided by treaty or by the provisions of the Act (R. 314; 90 F. Supp. 841). He read Sections 401–403 of

[12] This provision stems from the Act of July 27, 1868, 15 Stat. 223. See *Savorgnan* v. *United States*, 338 U. S. 491, 497–498.

the Nationality Act (8 U. S. C. 801–803) and charged that, since there was no pertinent treaty, the means there set forth are, "as applied to this case," "the sole and exclusive methods whereby a born American citizen can exercise the right of expatriation, and thus lose American nationality or citizenship" (R. 314–321; 96 F. Supp. 841–842). "Any American citizen who does voluntarily any of the acts set forth in § 401, which I have just read, is thereby expatriated, and thus loses his or her American citizenship" (R. 317; 96 F. Supp. 842).

The judge also pointed specifically to the provisions of Section 402, 8 U. S. C. 802 (*infra*, pp. 100–101), that a person born in the United States who remains more than six months in a country of which he is also a national shall be presumed to have expatriated himself by entering the army or accepting a post under such government, and charged (R. 321–322; 96 F. Supp. 843):

> Even though you find that evidence was presented to an American consular officer in 1946 which satisfied him sufficiently to overcome the presumption of expatriation provided in § 402 of the Nationality Act of 1940 which I have just read, such evidence and such finding of the consular officer are not binding on you.
>
> It is the duty of the jury, as triers of the facts in this case, to determine from all the evidence presented upon the trial

whether or not this presumption of expatriation has been overcome or outweighed.

The concluding portion of the charge on allegiance was as follows (R. 325; 96 F. Supp. 843):

> If you find from the evidence that the defendant voluntarily renounced or abandoned or otherwise lost his American citizenship or nationality prior to or during the period specified in the indictment, commencing August 8, 1944 and ending August 24, 1945, you must acquit the defendant, because the overt acts charged in the indictment, even if committed by him, could not constitute the crime of treason against the United States since his duty of allegiance ceased with termination of his American citizenship.
>
> On the other hand, if you should find from the evidence beyond a reasonable doubt that during the period specified in the indictment the defendant was an American citizen, you must also find that he then owed the United States the same duty of allegiance as any other citizen.
>
> As stated before, the defendant was at liberty during his stay in Japan to renounce or abandon his American citizenship and with it all duty of allegiance to the United States. But unless and until he did so, the defendant owed allegiance under our law to his native country, the United States.

Later, during the charge on intent to betray, the court also charged: "* * * even though

you also find the defendant was an American citizen, if you further find that at the time of such overt act or acts, if any, the defendant honestly believed that he was no longer a citizen of the United States, then the defendant could not have committed such overt act or acts with treasonable intent, and you must acquit him" (R. 347; 96 F. Supp. 847). This instruction was repeated and elaborated upon at some length during the deliberations of the jury (Tr. 5656–5657; 96 F. Supp. 858).

2. The special findings of the jury contain, with respect to each overt act as to which petitioner was found guilty, an affirmative answer to an interrogatory as to whether, during the period specified in the indictment, the defendant was "an American citizen owing allegiance to the United States, as charged in the indictment" (see, *e. g.*, R. 383),[13] as well as an affirmative answer to an interrogatory as to whether he committed the acts charged with intent to betray the United States (*e. g.*, R. 385).

The jury thus necessarily found that petitioner had not renounced or lost his American citizenship by voluntarily performing any of the acts of

[13] A form of the interrogatories submitted to the jury is set forth at 96 F. Supp. 851–852. All the interrogatories answered by the jury are reprinted in the Appendix to the Government's brief in the Court of Appeals, pp. 180–216 (Appendices to Brief for Appellee, Volume II, *Kawakita v. United States of America*, C. A. 9, No. 12,061). Copies of this Appendix have been lodged with the Clerk, for the convenience of the Court.

expatriation prescribed in the Nationality Act of 1940, and also that he did not believe that he had done so. The evidence clearly supports these findings.[14]

(a). The evidence is clear that petitioner did not enter or serve in the armed forces of Japan and thus did not expatriate himself under Section 401 (c) of the Nationality Act, 8 U. S. C. 801 (c), *infra*, p. 99. Indeed, he seems to have deliberately schemed to stay out of the Army. *Supra*, pp. 5–7. He testified at the trial that he had not joined the army because he had friends "at home" (Tr. 4047). The fact that, in his civilian employment for a civilian company, he assisted or took orders from military authorities certainly does not establish that he served in the army. He himself testified that he did not serve in the army as a soldier (Tr. 4239).

It is equally clear that petitioner did not accept or perform the duties of any office "under the government of a foreign state or political subdivision thereof for which only nationals of such states are eligible." Section 401 (d) of the Nationality Act, 8 U. S. C. 801 (d), *infra*, p. 99. He was employed by a private corporation operated for profit (Tr. 570–571). *Supra*, pp. 6–7. The

[14] The latter finding is discussed below, pp. 47–48. The two-witness requirement does not apply to proof of United States citizenship and allegiance. *Cramer* v. *United States*, 325 U. S. 1, 33, made it clear that the two-witness rule does not "preclude any proper evidence of non-incriminating facts about a defendant, such for example as his nationality, naturalization, and residence."

fact that in August 1944 civilian employees of the company were "frozen" in their jobs does not establish that the position was one under the government of Japan. It was merely a position regulated by the government of Japan in war time, just as the United States controlled many nongovernmental enterprises under the war manpower statutes and regulations. In any case, petitioner's continuance in employment after August 1944 was involuntary, and therefore could not amount to an act of expatriation. *Dos Reis* v. *Nicolls*, 161 F. 2d 860 (C. A. 1).

The jury was thus plainly warranted in finding that the presumption of Section 402 of the Nationality Act (*infra*, pp. 100–1)—which is a presumption of expatriation under Sections 401 (c) or (d), in the case of a dual national residing for six months or more in the country of his other nationality—had been overcome, and that petitioner had not expatriated himself by the methods set forth in Sections 401 (c) and (d).[14a]

(b). Petitioner makes no claim of expatriation under subsections (e) through (j) of Section 401, 8 U. S. C. 801 (e)–(j), *infra*, pp. 99–100, and there

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[14a] Contrary to what appears to be petitioner's argument, Section 402 does *not* provide that the American loses his nationality after the time specified in the section for the presumption of expatriation to arise, and regains it prospectively when the presumption is overcome. The overcoming of the presumption means that the person never lost his American nationality. See *Dos Reis* v. *Nicolls*, 161 F. 2d 860, 866, 868 (C. A. 1).

is no evidence that he performed any of the acts described in those provisions.[15]

(c). Petitioner does claim, however, that the entry of his name in the family census register, the "Koseki,"[16] constituted an "affirmation or other formal declaration of allegiance to a foreign state" under Section 401 (b) of the Nationality Act, 8 U. S. C. 801 (b), *infra*, p. 99. It is not claimed that petitioner took an oath or made a formal declaration of allegiance at that time; he simply had his name entered in the register and thus recorded the existing fact that he did have Japanese nationality. The Attorney General of Japan, petitioner's own witness, stated in his deposition that the entry into the family register is not necessary to acquire Japanese nationality. "Entering one's name into the family register is taken as an official certificate that one has Japanese nationality. * * * The registration into the Family Register is not necessarily a formal declaration of allegiance but merely a reaffirmation of an allegiance to Japan which already

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[15] The use of a Japanese passport in August 1944, to which petitioner testified (fn. 5, *supra*, p. 8), would not be by itself an act of expatriation under any provision of the Nationality Act of 1940. See fn. 26, *infra*, p. 46.

[16] The family register record was the accepted proof of identity used in connection with marriage, rationing, school, employment, etc. Almost all Nisei who lived in Japan at the outbreak of World War II found it necessary to obtain such credentials. See *Fujizawa* v. *Acheson*, 85 F. Supp. 674, 676 (S. D. Cal.); Blakemore, *Recovery of Japanese Nationality as Cause for Expatriation in American Law*, 43 American Journal of International Law 441, 449 (1949).

exists" (*viz*—the allegiance of any Japanese national born in a foreign country of Japanese parents before December 1, 1924) (Tr. 4003–4007).[17]

The deposition of the Attorney General makes clear that there is no merit in the suggestion, raised for the first time in the petition for certiorari, that petitioner did not have Japanese nationality because he did not have his name in the family register and that, accordingly, the entry constituted an act of naturalization which expatriated him under Section 401 (a), 8 U. S. C. 801 (a), *infra*, p. 98. The deposition establishes that petitioner had dual nationality at birth. The evidence shows that petitioner knew as early as 1940 that he had such dual nationality (R. 4228–4229). *Supra*, p. 5. The entry in the family register did not change petitioner's status or amount to a "naturalization" in any sense; it was merely an open disclosure of a fact and a status which petitioner had theretofore concealed, that he was a Japanese national.[18] Having that Japanese nation-

[17] The exclusion of part of the so-called deposition of the Mayor of Suzuka City as to the effect of the entry in the Koseki was proper (Tr. 3510–3525). The Mayor, who was not shown to be a lawyer or legal expert, was not competent to testify as to the effect under Japanese law of the entry, particularly since a deposition from the Attorney General of Japan was available (Tr. 3511–3512, 3514, 3515, 3517–3525). In addition, the Mayor's deposition was taken without the knowledge or appearance of the Government, and without cross-examination (Tr. 3510–3512).

[18] Blakemore, *supra*, fn. 16, at pp. 447–449, contends that "recovery" under Japanese law of Japanese nationality by former dual nationals who had renounced their Japanese

ality, petitioner used it when it was convenient for him to do so. But he did not at the same time renounce or abandon his American nationality. The jury, under the judge's charge, found that petitioner did not even think he had done so.

As we have pointed out (*supra*, pp. 29–33), the District Court's charge submitted to the jury the question of whether petitioner had expatriated himself under the 1940 Nationality Act.[19] The jury found that he had not, on evidence which was at least substantial and sufficient, and in our view was overwhelming. In *Gillars* v. *United States*, 182 F. 2d 962, 981–984 (C. A. D. C.) ("Axis Sally"), the trial judge refused to send to the jury the defendant's claim that she had expatriated herself by signing a somewhat vague and informal "oath of allegiance" to Germany, and the Court of Appeals upheld the ruling. See also *Burgman* v. *United States*, 188 F. 2d 637, 640 (C. A. D. C.), certiorari denied, 342 U. S. 838.

B. *Petitioner could not and did not renounce or*

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citizenship does amount to "naturalization" within the meaning of Section 401 (a). Such "recovery" involved registration in the Koseki, as well as other formalities. Petitioner, of course, had never renounced Japanese citizenship and therefore did not have to apply for "recovery," as did his fellow-interpreter Fujizawa. See *Fujizawa* v. *Acheson*, 85 F. Supp. 674 (S. D. Cal.), and opinion of the court below, Part II, 190 F. 2d at 514–515.

[19] The charge stated that "What the foreign law is—in this case the law of Japan—is a question of fact to be determined by the jury from the evidence, the same as any other question of fact" (R. 311; 96 F. Supp. 841).

lose American nationality by means other than those set forth in the Nationality Act of 1940.— Petitioner argues that, even though he performed no act which would have expatriated him under the Nationality Act of 1940, his entire course of conduct after 1943 showed an election to take Japanese nationality to the exclusion of American nationality, that such right of election exists independently of the provisions of the Nationality Act, and that, accordingly, the judge erred in charging the jury that petitioner could have expatriated himself only in accordance with the Nationality Act. He relies for this phase of the argument on the recent decision of the Court of Appeals for the District of Columbia Circuit in *Mandoli* v. *Acheson*, decided January 10, 1952, petition for a writ of certiorari pending, No. 597, this Term, in which that court expressed the view that a person who is a dual citizen at birth loses American nationality by electing to remain in the country of his other nationality for a continued period after attaining majority.[20]

1. The actual holding in the *Mandoli* case re-

[20] Petitioner also appears to rely on some general language in the opinion in *United States* v. *Yasui*, 48 F. Supp. 40 (D. Ore.), relating to loss of American nationality. This Court affirmed the conviction in *Yasui's* case for violation of the wartime curfew law, but remanded the case to the District Court to strike its findings as to loss of nationality. 320 U. S. 115. The part of the District Court's findings which was ordered stricken is the only part on which petitioner relies.

lates to the state of the law prior to the enactment of the Nationality Act of 1940, since the petitioner there, if he had expatriated himself, had done so before the 1940 act was passed. That question is not here involved. Insofar as the *Mandoli* opinion suggests that, after 1940, a citizen may expatriate himself by means other than those set forth in the Nationality Act, we think it is clearly erroneous.

The Nationality Act of 1940 was originally drafted, at the request of Congress, by representatives of the Departments of State, Labor, and Justice. See Hearings before the Committee on Immigration and Naturalization of the House of Representatives, on H. R. 6127, superseded by H. R. 9980, 76th Cong., 1st sess., p. 28.[21] The Chairman of the Committee stated at the outset of the hearings (p. 28):

> Five or six years ago the matter was brought up. It was realized then that there was a great need for codification of all these laws and we went and asked that there be a report prepared by the Departments of State and Labor and Justice. The President approved of that and that was done.
>
> Now the Departments of State, Labor, and Justice have worked very hard and

[21] The matter had been under special study in the three departments since April 1933. Exec. Order No. 6115, dated April 25, 1933. In 1938, the President transmitted to Congress a Report on the Revision and Codification of the Nationality Laws of the United States, together with a proposed nationality code, prepared by the three departments.

> they have brought out a full codification of all of these laws. * * *
>
> Now, up to this time, the law on this subject has never been modified or changed, but it has been all mixed up. From the laws as they existed you would not know who is who or what is what. Then the question came up time and time again in regard to lost citizenship and all these matters required to make up a definite code to understand what the law is on any subject.

In the light of this background,[22] we think that, in the Nationality Act of 1940, even more than in the Immigration Act of 1906, Congress must be deemed to have formulated "a self-contained exclusive procedure." See *Bindczyk* v. *Finucane*, 342 U. S. 76, 83. The law on the subject of the duty of a dual national, taken during minority to the country of his other nationality, to make an affirmative election of American nationality on reaching majority, was, as the Chairman of the House Committee stated, at best unsettled.[23]

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[22] The proposed nationality code formed the framework of the Nationality Act of 1940, which adopted most of its suggestions on loss of nationality. Hearings, *supra;* H. Rept. Nos. 2396 and 3019, 76th Cong., 3d Sess.; S. Rept. No. 2150, 76th Cong., 3d Sess.; 86 Cong. Rec. 11939–11965, 12817–12818, 13244–13250, 13183–4.

[23] Cf. State Department rulings cited in *Perkins* v. *Elg*, 307 U. S. 325, 329–334, 334–347, and *U. S. ex rel. Rojak* v. *Marshall*, 34 F. 2d 219, 220 (W. D. Pa.), with *Leong Kwai Yin* v. *United States*, 31 F. 2d 738 (C. A. 9); see also Flournoy, *Dual Nationality and Election*, 30 Yale Law Journal 545, 562–4, 693 ff. (1921); III Hackworth, Digest of International Law (1942), pp. 370–1, 373–4. See Memorandum for the Respondent in *Mandoli* v. *Acheson*, No. 597, this Term.

When the legislation was being drafted, the State Department suggested a provision to the effect that such a dual national be required, on reaching majority, to make an election and to return to the United States if he elected American nationality. This provision was opposed by the Departments of Justice and Labor and was therefore omitted from the proposed bill which became the Nationality Act (Hearings, *supra,* pp. 248, 267–268).

If the 1940 act were merely a codification of existing law, it might possibly be argued that this deliberate omission was merely a decision to leave the question open for final judicial determination. The 1940 act, however, went further than existing law. The provisions of Sec. 401 (*infra,* pp. 99–100) for loss of nationality by serving in the armed forces of a foreign state, by holding foreign governmental office, or by voting in foreign elections, were new. *Savorgnan* v. *United States,* 338 U. S. 491, 501 (fn.). Section 402 (*infra,* pp. 100–101), dealing specifically with persons having dual nationality, was new, and may represent an attempt to deal in less drastic form with the problem of dual nationals which the State Department had desired to resolve by a full application of the election doctrine. Other sections of the Act also went far beyond the prior law. See Flournoy, *Fundamental Principles Relating to Ascertainment of Nationality,* 10 Fed. Bar Journal 275, 283–5 (1949). Such a full-scale revision and elaboration of the rules for expatriation put

an end to whatever "common law" of expatriation may theretofore have existed.

Moreover, Section 408 of the Act (8 U. S. C. 808) expressly provides: "The loss of nationality under this Act shall result solely from the performance by a national of the acts or fulfillment of the conditions specified in this Act." In terms, this provision, which is headed "Exclusiveness of means of losing nationality" in the United States Code (8 U. S. C. 808), forbids reliance on acts other than those specified in the loss-of-nationality sections of the 1940 Act, as amended.[24] It may be, as the report of the drafting committee shows, that Congress also had in mind the purpose of making "it clear beyond question that loss of nationality under a provision of chapter IV ["Loss of Nationality] in no way depends upon a ruling of any officer of the United States" (Hearings, p. 504). But the language of Section 408, taken together with the background and object of the whole act, does establish, we think, that

[24] The *Mandoli* opinion suggests that the words "under this Act" show that Section 408 was not meant as an exclusiveness provision. The answer seems to us to be that (a) there are now no statutes other than the 1940 Act dealing with expatriation, except the general declaration of 1868 (8 U. S. C. 800), since the 1940 Act repealed the prior legislation, and (b) the reference to "loss of nationality *under this Act*" probably was intended, as an additional precaution, to preserve all treaties and conventions dealing with expatriation. See Section 410 of the Nationality Act, 8 U. S. C. 810, *infra*, p. 101.

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Congress intended the means of expatriation listed in chapter IV to be exclusive.[24a]

As the *Mandoli* opinion indicates, the consistent executive construction since 1940 has been that the 1940 Act provides the corpus of American expatriation law. In particular, the administrative interpretation has been that dual nationals do not lose United States nationality merely by residing in the country of their other nationality after majority. See *In the Matter of R.*, Administrative Decisions under Immigration and Nationality Laws, Vol. 1, p. 389 (1943) (Board of Immigration Appeals), holding that, even before 1940, mere residence abroad did not result in loss of citizenship; see also Flournoy, *supra*, 10 Fed. Bar Journal, at 281–282, in which Mr. Flournoy, who represented the State Department in drafting the Nationality Act, expresses the view that legislation is needed to require election by persons having dual nationality at birth who are domiciled in the country of their other nationality at the time they reach majority. The United States law of nationality is the law as set forth in the Act of 1940.[25]

[24a] Congress has undoubted constitutional power to make the acts specified in Chapter IV of the Act the sole means of expatriation. Cf. *Savorgnan* v. *United States*, 338 U. S. 491; *Acheson* v. *Okimura*, 342 U. S. 899; *Acheson* v. *Murata*, 342 U. S. 900; *Kuniyuki* v. *United States*, 189 F. 2d 741 (C. A. 9), certiorari denied March 3, 1952, No. 492, this Term.

[25] Of course, if the law before 1940 did not provide for a non-statutory duty by a dual national at birth to elect between

2. In any event, the principle of election would not affect this case. The jury was instructed that petitioner had to be acquitted if they found that he honestly believed he had renounced or lost American nationality. (R. 347; 96 F. Supp. 847.) This instruction was stressed in the final supplemental charge to the jury (Tr. 5656–5657; 96 F. Supp. 858). *Supra*, pp. 32–33. Under the circumstances of this case, the finding of the jury that petitioner did not believe that he had renounced or lost his United States nationality is necessarily

his two nationalities on attaining his majority, then it is even clearer that there was no such duty of election after 1940. In our Memorandum for the Respondent in *Mandoli* v. *Acheson*, pending on petition for a writ of certiorari, No. 597, we point out the strong reasons for believing that there was no such duty before 1940.

Comprehensive immigration and nationality bills are now before Congress which do provide for loss of nationality by a dual national upon failure to return to this country before he reaches 25 (with exceptions). See H. R. 5678, 82d Cong. (reported favorably by H. Rept. No. 1365, 82d Cong., 2d Sess., p. 87 (February 14, 1952)), Section 350 ("Dual Nationals; Divestiture of Foreign Nationality"), providing for loss of nationality by a dual national at birth who resides more than three years in the foreign state of his other nationality after attaining twenty-two years, unless he takes an oath of allegiance to the United States and continues his foreign residence solely for certain prescribed purposes; this provision for loss of nationality does not apply at all to a person "if he shall have been physically present in the United States for a period or periods totalling ten years between the ages of ten and twenty-five." Section 350 of the comparable Senate bill, S. 2550, 82d Cong., is to the same effect, but does not contain the exception for a person living in the United States for ten years between ten and twenty-five. The Senate bill was reported favorably on January 29, 1952. See S. Rept. No. 1137, 82d Cong., 2d Sess., p. 49.

a finding that he had not consciously elected Japanese nationality to the exclusion of United States nationality.

Petitioner did not reach majority until 1942, when the war made it impossible for him to return to the United States. He returned in 1946. Even where the doctrine of election is applicable, the dual national has always been granted a "reasonable time," which may be a period of two or three years, in which to evidence his choice. See Section 401 (a) of the Nationality Act, 8 U. S. C. 801 (a), *infra*, pp. 98–9; *Perkins* v. *Elg*, 307 U .S. 325, 342, 346. Under this combination of circumstances, as the action of the State Department in this very case shows, the mere failure to return until 1946 would not be deemed an election of Japanese nationality. There would necessarily have had to be some other affirmative indication of a choice of Japanese nationality, to the exclusion of American, for the doctrine to be applicable.

But the other acts which petitioner claims evince an election to be Japanese are, in the wartime setting, no more conclusive of deliberate election than continued residence. Assuming that, as petitioner testified, he did travel on a Japanese passport in 1944 (Tr. 4059), it is obvious that in war he could not obtain a United States passport.[26] The fact that he used the Japanese

[26] It should be noted that, as originally proposed, the bill which became the Nationality Act, would have provided for

nationality which he admittedly had for such purpose would not prove that he had renounced United States nationality. Similarly, as we have shown (*supra*, pp. 36–38), the entry in the family register was merely a recordation of an existing fact undoubtedly necessitated by war conditions. None of petitioner's acts could, under the circumstances, be deemed a definite act of election, without proof that petitioner intended thereby to renounce United States nationality. The jury found that he did not have such intention.

3. The evidence supports the finding that petitioner always thought that he had American citizenship. He went to Japan as an American citizen on an American passport, which he renewed in 1941. Immediately after the war, he came back to the United States as an American citizen on an American passport. At that time he swore that he was an American citizen and had not performed acts of expatriation. *Supra*, pp. 8–9. His family were in the United States, and at the trial he spoke of the United States as his "home" (Tr. 4047). Even in the period when he was actively aiding the Japanese cause, he told American prisoners of war that he would return to the United States whichever way the war went

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expatriation by using a passport of a foreign state as a national thereof (Hearings, p. 491). Objections to this section were voiced on the ground that American citizens who had erroneously been denied a passport, would be obliged to obtain another (Hearings, pp. 387–388). The section was later dropped.

(Tr. 883, 1400, 2046–2047, 2160), and that he w
an American citizen (Tr. 2339). He carefu
did not join the Japanese army or take a gove
ment job, acts which would have expatriated hi
Supra, pp. 6–7, 34–35. It may be, as petitione
now forced to contend, that he actually thou
he had renounced or lost his American citizensh
sometime during 1944–45, and that he lied
December 1945 when he stated under oath
the United States consul that he was an Americ
and had not expatriated himself. But the ju
was entitled to believe, on the evidence before
that petitioner knowingly and deliberately ch
to retain his United States nationality for
value it might have, and that he took advanta
of that retention of nationality to claim the be
fits of American citizenship after the war.

Petitioner contends that it was error to ad
evidence relating to the proceedings before
consular officer when he obtained his Uni
States passport at the close of the war. Ma
festly, however, it was relevant to the issue
whether petitioner believed he had renounced
lost American citizenship to show that, almost
soon as the opportunity was available to him,
asserted his United States citizenship and
turned to his domicile in the United States.
Knauer v. *United States,* 328 U. S. 654, in wh
evidence of petitioner's utterances immedia
after naturalization was deemed relevant to sh
the intent with which petitioner had obtai

naturalization. Nothing so clearly shows that petitioner never intended to renounce or abandon United States nationality as his own post-surrender actions in taking the benefits of United States nationality.

C. *So long as he did not renounce or lose his United States nationality, petitioner owed allegiance to the United States and can be punished for treasonable acts voluntarily committed.*—Petitioner's argument that, as a dual national residing in Japan, he owed no allegiance to the United States in war time, *i. e.*, that he could *voluntarily* be actively hostile to the United States during the war and then with impunity claim all benefits of United States citizenship after the war, refutes itself by the mere statement. No concept of nationality requires so absurd a result.

The determination of who is a national of a particular country and the obligations which flow from such nationality are matters of domestic law. *Perkins* v. *Elg*, 307 U. S. 325, 329; 1 *Oppenheim's International Law* (Lauterpacht, 5th ed.), Sec. 293; 3 Hackworth, *Digest of International Law* (1942), p. 1. A citizen of the United States owes allegiance to the United States wherever he may reside. *Blackmer* v. *United States*, 284 U. S. 421, 436; *Skiriotes* v. *Florida*, 313 U. S. 69, 73.[27] Un-

[27] See also the definition of the term "national of the United States" in Sec. 101 (b) of the Nationality Act of 1940, 8 U. S. C. 501 (b), to mean "(1) a citizen of the United States, or (2) a person who, though not a citizen of the United States, owes *permanent allegiance* to the United States" (emphasis supplied).

like some other countries, and unlike the rule at common law, the United States has recognized the right of a citizen voluntarily to renounce his nationality, and with it his allegiance. The 1940 act gives a citizen the right to do so even in war time, although the 1907 act had expressly prohibited expatriation during such time, 34 Stat. 1228. Petitioner could thus have chosen to give total allegiance to Japan without subjecting himself to a charge of treason under American law, had he been willing to renounce his United States nationality. But he could not retain the benefits of citizenship and at the same time escape the obligation of allegiance which is the concomitant of citizenship under American law.[28]

[28] Cases relied upon by petitioner, which hold that property of American citizens residing in enemy country may be treated as alien enemy property, are clearly inapposite to considerations of the personal obligation of allegiance flowing from citizenship. Cf. *Murray* v. *The Charming Betsy*, 2 Cranch 64, 120, in which Chief Justice Marshall, in ruling that an American who had taken an oath of allegiance to a foreign state lost the right to protection by the United States, was careful to point out that the Court was not deciding whether such act was "sufficient to rescue him from punishment for any crime committed against the United States." And in *The Venus*, 8 Cranch 253, 280, the Court upheld the seizure of the property of an American residing in England during the War of 1812, but pointed out that such an American's "adherence" to the enemy was not criminal "unless he engages in acts of hostility against his native country."

Petitioner's argument—that Americans residing in enemy territory are necessarily enemies "for all purposes," and so cannot be held for treason—is tantamount to the argument that treason against the United States cannot be committed

As a matter of strict logic, the United States is perhaps not under a duty to take any notice of Japan's claims on petitioner in determining whether petitioner's conduct constituted treason under United States law. A person having the nationality of two countries at war with each other is, as a theoretical matter, inevitably subject to conflicting claims. "In time of war if he supports neither belligerent, both may be aggrieved. If he supports one belligerent, the other may be aggrieved." Orfield, *The Legal Effects of Dual Nationality*, 17 George Washington Law Review 427, 429 (1949).[29] Probably the only definitive resolution is the open election of one nationality or the other, thus making him a resident enemy alien if he chooses the citizenship of the other belligerent, or a full and sole national of the country in which he resides if he selects its nationality.

Petitioner, however, was not convicted under a charge which permitted him to be held as a traitor

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abroad or in enemy territory. This contention has been canvassed and rejected in *Chandler* v. *United States*, 171 F. 2d 921, 929–932 (C. A. 1), certiorari denied, 336 U. S. 918; *Gillars* v. *United States*, 182 F. 2d 962, 978–980 (C. A. D. C.); *Best* v. *United States*, 184 F. 2d 131, 136–7 (C. A. 1); *Burgman* v. *United States*, 188 F. 2d 637, 639 (C. A. D. C.), certiorari denied, 342 U. S. 838. The related argument that an American living abroad and deprived of this country's protection cannot commit treason was also rejected in *Chandler* and *Burgman*.

[29] Such was the position in which the dukes of Brittany found themselves in the wars between England and France. Hale, *Pleas of the Crown* (1847 ed.) Vol. I, p. 69.

if he assisted the Japanese in any way whatever, unless he proved that he had made such an absolute election of Japanese nationality and had definitely expatriated himself from this country. As in other recent treason cases (*Chandler* v. *United States,* 171 F. 2d 921, 944–945 (C. A. 1), certiorari denied, 336 U. S. 918; *Gillars* v. *United States,* 182 F. 2d 962, 979–980 (C. A. D. C.); *Burgman* v. *United States,* 188 F. 2d 637, 640 (C. A. D. C.), certiorari denied, 342 U. S. 838; *D'Aquino* v. *United States,* 192 F. 2d 338, 357 *ff* (C. A. 9), pending on petition for a writ of certiorari, No. 209 Misc.), petitioner was held only to the requirement that he refrain from voluntarily assisting the enemy beyond the obligations necessitated by the fact of residence.

The trial judge instructed the jury that if they found that petitioner had not committed any overt act "willingly or voluntarily, but so acted only because performance of the duties of his employment required him to do so or because of other coercion or compulsion, you must acquit" him (R. 344; 96 F. Supp. 847). Under this charge, petitioner was unequivocally excused for conduct (a) required by the performance of his duties at Oeyama, (b) demanded of him by the laws of Japan, or (c) compelled by other external force, coercion, or duress. In fact, this charge held petitioner to a lower standard of conduct than the defendants in some of the other recent treason cases cited above, in which the trial courts charged that excusable

duress was only such as put the defendant under the apprehension of immediate and impending death or of serious and immediate bodily harm. *Gillars, supra,* at pp. 976-977; *D'Aquino, supra,* at 357 *ff.* See also *Respublica* v. *McCarty,* 2 Dall. 86; *United States* v. *Vigol,* 2 Dall. 346, 347. The District Court here did not so qualify its instruction, and the jury was required to acquit if it found that petitioner performed any of the overt acts merely because they were demanded of him by his employer or were impelled by any other coercion or compulsion.[30]

It follows that this case does not present the issue which might arise if a dual national could show that the alleged treasonable acts were committed at the demand or under the compulsion of the laws of the country of his other nationality. We do not have a case, for instance, in which Japan or Germany forced a dual national to beat American prisoners of war into greater productive activity, or even a case in which it was merely demanded of the dual national by his employer that he do so. In order to convict, the jury had to find, and did find, that petitioner's acts were freely performed, beyond the scope of the demands of the country of his residence and of his employment, out of intent to adhere to the enemy and betray the United States. The

[30] Petitioner's offered instructions on dual nationality (Nos. 46 and 49, R. 154, 157) were properly refused because they would have instructed the jury that petitioner owed no allegiance to the United States at all.

evidence supports the verdict since it indisputably establishes that petitioner had no authority from his company or the Japanese government to act in any capacity other than interpreter. *Supra*, p. 11. His acts, in assisting the military to punish prisoners of war in a brutal manner, and in endeavoring to force more work out of the prisoners, were wholly voluntary, born of the zeal with which, when he thought Japan was in the ascendancy, he adhered to the Japanese cause. Such acts were therefore manifest violations of the allegiance which, as an American citizen, he owed to the United States, for in deliberately retaining United States nationality he clearly retained, at the very least, the obligation not to adhere to the enemy beyond the requirements imposed upon him by the laws of Japan.

In sum, this is a case of a dual national voluntarily performing acts of hostility to this country which he was not required to do by Japan; the non-performance of these acts would not have subjected him to a charge of treason against Japan[31] or of violation of other Japanese laws. Nor were these acts of hostility forced from him by any other compulsion. It is in these circumstances that petitioner insists on his full

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[31] Petitioner could doubtless have been punished by Japan for treason committed against it, possibly even if he renounced Japanese nationality. Cf. *Rex* v. *Joyce*, 173 L. T. R. 377 (1945), affirmed *sub nom. Joyce* v. *Director of Public Prosecutions*, [1946] A. C. 347.

freedom, even though an American citizen, to perform acts of hostility against this country. Such freedom would be a complete nullification of that minimum of allegiance which every American, wherever he is, owes to the United States.

Contrary to petitioner's elaborate insistence, the State Department has never taken any other view. The most that it has done has been to point out that it will rarely extend this Government's protection to a dual national residing in the country of his other nationality, because while he is there the allegiance he owes to that country is "paramount" to that of the United States. See Exhibit DR (which does not contain the "paramount" language) and the Passport Division Officer Instructions, dated May 19, 1941, Subject: Dual Allegiance (printed in the Appendix to petitioner's Brief in the Court of Appeals, pp. 15–17). But that is far from saying that the dual national has *no* allegiance to this country and that he cannot commit treason by doing acts beyond those demanded by his allegiance to the country of his residence. Even if the word "paramount" were wrested from its context in a departmental instruction on protection of Americans abroad, it would not mean "100%" or "total," or permit voluntary acts of hostility not demanded by the other allegiance. The farthest it could possibly be stretched would be to absolve dual nationals for acts required by the nation of their residence.

But, as we have just shown (*supra*, pp. 52–55), that is not petitioner's case at all.[33]

II

THE BRUTAL TREATMENT OF PRISONERS OF WAR TO MAKE THEM SUBSERVIENT AND COMPEL THEM TO WORK HARDER WERE ACTS OF TREASON WHICH GAVE AID AND COMFORT TO THE ENEMY

Petitioner's argument, that the conduct with which he was charged did not constitute treason, appears to have several facets. He contends that, since his activities were directed toward prisoners of war who were out of combat, such acts could not constitute aid and comfort to the enemy, but were merely infractions of local law under Japan's undertaking to be bound by the Geneva convention. Somewhat inconsistently, he also seems to urge that these acts were merely acts of punishment directed against recalcitrant prisoners of war. He further contends that the specific overt acts with which he was charged do not

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[33] Equally far-fetched is petitioner's reliance on *Carlisle* v. *United States*, 16 Wall. 147, which merely held that British subjects domiciled in this country could commit treason against the United States by acts of aid and comfort to the Confederacy. That holding does not mean that Great Britain could not hold these nationals for treason committed against it, if such circumstances should arise.

Ex parte Quirin, 317 U. S. 1, and *In re Territo*, 156 F. 2d 142 (C. A. 9), upon which petitioner also relies, held that Americans serving in the enemy's armed forces, and captured while so serving, can be held and treated as prisoners of war or as enemies.

sufficiently manifest aid and comfort under the rule laid down by this Court in *Cramer* v. *United States*, 325 U. S. 1.

A. Petitioner seems to believe that, because the acts of brutality were in contravention of the Geneva convention by which Japan had agreed to be bound, they could not amount to treason against the United States. If the argument is that he was theoretically violating the laws of Japan (which may be thought, on analogy to our own constitutional provision, to incorporate the Geneva convention), and therefore by that fact alone could not possibly have aided and comforted that country, it is obviously fantastic. One very important way to help a belligerent can be through violation of its international obligations, even though one may be violating the internal laws of the country at the same time. (Witness the violation of Belgium's neutrality by Germany in World War I.)

If the argument is that since petitioner's conduct violated local Japanese law, no other country could have any interest or concern, it is equally unsubstantial. An Englishman living in Washington during World War II, who conveyed secret information from United States files to Germany, would have violated the laws of the United States, and at the same time have committed treason against Great Britain. Whether or not petitioner's acts were unauthorized under

the law of Japan is immaterial, so long as it is proved that those acts gave aid and comfort to Japan. He was tried for the breach of allegiance which, as an American, he owed to the United States under American law. In that inquiry, it is not relevant whether he also violated the law of another country.

B. Perhaps petitioner is really contending that the American prisoners of war broke the lawful rules and regulations pertaining to their captivity, and were duly and properly punished therefor by the conduct of which he was found guilty. That fact would also be immateral, even if it were true, which it is clearly not.[34] Violation by one American of the rules of war governing him does not license another American, acting on the enemy's behalf, to help in the infliction of punishment, with intent to aid and adhere to the enemy. For example, spying in enemy territory is contrary to the laws of war (*Ex parte Quirin*, 317 U. S. 1, 27–37), but it could hardly be said that an American residing in the enemy's territory was free to participate in the prosecution, conviction, and punishment of an American

[34] Petitioner was not required by his employment to inflict punishment. *Supra*, p. 11. The type of punishment inflicted was not lawful under the laws of war or the Geneva convention even if an offense had been committed. Geneva Convention of July 27, 1929, Sec. V, Chap. 3, Articles 46, 54, 47 Stat. 2021, 2047, 2049. There is no showing, in the case of many of the overt acts, that the prisoners involved did break any lawful camp order or regulation. *Supra*, pp. 14–18.

y, on behalf of the enemy and with intent to st his lot with it. Such conduct would be eason, though it would probably not be a war ime. If the acts are acts of aid and comfort nd the intent is to betray, it does not matter that e traitor could or could not be found guilty of war crime (*e. g.*, for inflicting punishment con- ary to the laws of war). Treason and war imes are separate offenses, as was made crystal ear to the jury in this case,[35] and treason can e committed by one who scrupulously follows the ws of war.

C. The question remains whether petitioner's onduct gave the enemy aid and comfort, within ne rules accepted and established by this Court. n the case of each of the eight overt acts of which etitioner was found guilty, the jury answered in ne affirmative an interrogatory specifically asking hem whether the act was "actually of aid and

[35] The jury were cautioned during the trial that this was ot a "war crimes" trial. See, *e. g.*, Tr. 448–449 ("This is ot a so-called atrocity trial or war crimes trial. This is treason trial"—with further elaboration); Tr. 651–652 (to imilar effect). The charge stated (R. 360; 96 F. Supp. 849): "Ycu have been cautioned that this is not a so-called war crimes' trial—that the defendant is not on trial for naltreatment or deprivations suffered by American prisoners of war. It is not charged here that mistreatment r even cruelty to prisoners of war alone, if such occurred, onstitutes the crime of treason. Nor is it claimed that he defendant is responsible for the conditions which xisted generally in any Japanese prisoner of war camp. The defendant is not here sought to be charged with esponsibility for any acts of others." See also R. 362, 96 F. Supp. 850 (instruction 16–A).

comfort to the enemies of the United States, to wit, the Government of Japan, as charged in the indictment" (Interrogatory (4), *e. g.*, R. 384; see 96 F. Supp. 852). We submit that the jury was correct and that petitioner's conduct clearly had the effect of aiding and comforting the enemy.

Chief Justice Marshall early announced the principle which governs this case when, in *Ex parte Bollman*, 4 Cranch 75, 125–126, he said:

> * * * if war be actually levied, * * * all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors.

The same idea was later expressed in *Charge to Grand Jury*, reported in 1 Bond 609, 30 Fed. Cases No. 18272 (C. C. S. D. Ohio), as follows:

> In general, when war exists, any act clearly indicating a want of loyalty to the government, and sympathy with its enemies, and which, by fair construction, is directly in furtherance of their hostile designs, gives them aid and comfort.

And in *Young* v. *United States*, 97 U. S. 39, 65, this Court said (using the words of Mr. Justice Field on circuit):

> Wherever overt acts are committed, which in their natural consequence, if successful, would encourage and advance the interests of the [enemy], in judgment of law aid and comfort are given.

More recently, the Court, in *Cramer* v. *United States*, 325 U. S. 1, 28–29, adopted the definition given by Lord Reading in *Rex* v. *Casement*, [1917] 1 K. B. 98:

> * * * an act which strengthens or tends to strengthen the enemies of the King in the conduct of a war against the King, that is in law the giving of aid and comfort.

And in both the *Cramer* case (325 U. S. at 34) and *Haupt* v. *United States*, 330 U. S. 631, 634, the Court held that the minimum function of the overt act in a treason prosecution is that it show action by the accused, in its setting, which really gave aid and comfort to the enemy.

1. There can be no question that acts of cruelty against American prisoners of war evinces lack of loyalty to the United States and sympathy with its enemies. *Infra*, pp. 74 *ff*. Such acts were also, in the setting of this case, directly in furtherance of the enemy's hostile design, acts which tended to strengthen the enemy, to encourage and advance its interests. The prisoners of war involved in this case were being utilized to produce metals for munitions of war, a fact which petitioner admittedly knew, *supra*, pp. 6–7, 9–10, 11–13. There was obviously no incentive for the prisoners to perform any more work than they were actually obliged to perform.[36] Any act which was designed

[36] There is even testimony, elicited from a prosecution witness on cross-examination, that the prisoners were attempting to produce as little as possible for Japan's war effort

or had a direct tendency to force more work from the prisoners, either immediately or in the longer run, was thus an act of direct and real aid and comfort to Japan in obtaining the munitions of war.

Insofar, therefore, as the overt acts found by the jury charged acts of brutality which were designed or had a direct tendency to force more work out of the prisoners, there can be no doubt that they were sufficient acts of treason. Even more clearly than the overt acts of sheltering an enemy spy and helping him to obtain an automobile and employment, involved in *Haupt* v. *United States*, 330 U. S. 631, petitioner's acts in forcing extra labor from the prisoners of war in themselves show actual aid and comfort to the enemy.[37] In fact, they go further and in themselves constitute evidence of the treasonable purpose and intent. There is no doubt that they meet the test

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(witness Armellino, Tr. 1223–1224). Putting the prisoners to this kind of work appears to have been contrary to the Geneva Convention of July 27, 1929, Article 31, 47 Stat. 2021, 2041.

[37] Acts designed or tending to force work out of the prisoners are comparable to the selling or giving of supplies to the enemy, or purchasing goods from them, which have long been held sufficient overt acts. *United States* v. *Lee*, 26 Fed. Cas. 907, No. 15,584 (C. C. D. C.) (supplying the British with "fruit and melons" in the War of 1812); *Hanauer* v. *Doane*, 12 Wall. 342, 347; *Carlisle* v. *United States*, 16 Wall. 147; *Young* v. *United States*, 97 U. S. 39, 65 (each dealing with sale of goods to the Confederacy); *Sprott* v. *United States*, 20 Wall. 459 (purchase of goods from the Confederacy).

laid down by this Court in *Cramer* v. *United States*, 325 U. S. 1, 32–35.

. Two overt acts fall in the category of acts designed to force more work at that very moment. These are Overt Act (a) which alleged that petitioner kicked Toland because he slowed down in his work of lifting ore rocks (*supra*, pp. 14–15), and Overt Act (j) which charged that petitioner forced a prisoner (Armellino) to carry two buckets of lead instead of one (*supra*, pp. 17–18). For the time being, we shall consider these two acts alone.

Petitioner argues that neither act was important enough to amount to aid and comfort which would help Japan win the war. But the degree of aid and comfort is not the test, so long as there was actual aid and comfort. In the words of Chief Justice Marshall in *Ex parte Bollman*, *supra*, any act of aid and comfort "however minute" is treason. In *Haupt* v. *United States*, *supra*, one of the overt acts charged that the defendant accompanied his saboteur son to the home of his former employer for the purpose of assisting the son in obtaining employment. All that happened at the time was that the son applied for his former position and gave a false explanation of his absence. The defendant's assistance, by his presence, was held to amount to an act of aid and comfort. In the crime of treason by levying war, "the very act of marching is considered as carrying the traitorous intention into effect."

United States v. *Mitchell*, 26 Fed. Cases No. 15,788 at p. 1282 (C. C. D. Pa.). See also *Stephan* v. *United States*, 133 F. 2d 87, 92 (C. A. 6), certiorari denied, 318 U. S. 781 (also 318 U. S. 746, 319 U. S. 783, 319 U. S. 423) (particularly Overt Act (3)).

In the kind of treason here involved, each single act designed to force more work out of prisoners may in itself have been a small contribution to the ultimate goal. But so long as, in its setting, it is an act which makes manifest the treasonable purpose and helps the enemy, it is an act which meets and goes beyond the standard laid down in the *Cramer* case.[38] It is not a "commonplace, in-

[38] The opinion in *Chandler* v. *United States*, 171 F. 2d 921, 940 (C. A. 1), certiorari denied, 336 U. S. 918, suggests that the overt act of treason may consist of a general course of conduct (in that case, broadcasting for Germany) which could be established "by the direct testimony of two or more witnesses, though no two witnesses could testify to the same atomized element of the course of conduct." We think the suggestion has considerable support in principle and authority. A continuous course of conduct, much more than any one single atomized act, would "show sufficient action by the accused, in its setting, to sustain a finding that the accused actually gave aid and comfort to the enemy." *Cramer* v. *United States*, 325 U. S. at p. 34. The view of the *Chandler* opinion is supported, among other authorities, by *United States* v. *Mitchell*, 2 Dall. 348, 26 Fed. Cases No. 15,788 (C. C. D. Pa.), one of the cases arising out of the Whiskey Insurrection of 1794. The defendant was indicted for the treason of levying war by assembling at Couche's fort and then proceeding to set fire to General Neville's house. There were two witnesses to the fact that the defendant was at the fort, but only one to the fact that he was at the burning of the General's house, and one to the fact that he was seen marching to the house. Mr. Justice Paterson thought that the better view of

significant and colorless" act (*Haupt*, 330 U. S. at 634) which neither helps nor harms, but one which definitely aids the enemy within the sphere of activity in which the defendant is engaged. A comparable situation was involved in *Chandler* v. *United States*, 171 Fed. 921, 941 (C. A. 1), certiorari denied, 336 U. S. 918, where some of the overt acts charged were merely conferences preparatory to the broadcasts by the defendant. The court said:

> Possibly the overt acts, viewed in rigid isolation and apart from their setting, would not indicate that they afforded aid and comfort to the enemy. But viewed in their setting, * * * they certainly take on incriminating significance. They then appear as typical routine activities of Chandler in fulfillment of the purpose of his continuous employment as radio commentator for the German Propaganda Ministry over a period of three years. * * * These services consisted not merely of the culminating act of making a recording, but also of the necessary preliminary acts directed to that end. They were all

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the case was that the meeting at the fort and the burning of the house together constituted one overt act of treason, and that the whole act was sufficiently proved by the testimony that the defendant was at the fort and that one person saw him march from thence and another saw him at the conflagration at the house. See also *United States* v. *Burr*, 25 Fed. Cases 55, Case No. 14,693, at 173. In this view, the case against petitioner fully established a general course of conduct which was manifestly of aid and comfort to the enemy.

> part and parcel of the totality of aid and comfort given by the course of conduct as a whole. * * *

See also *Best* v. *United States*, 184 F. 2d 131, 137 (C. A. 1).

Nor is it necessary that the overt act of treason amount to a successful completion of the traitorous purpose. *United States* v. *Greathouse*, 4 Sawy. 457, 26 Fed. Cases No. 15,254 at p. 24; Foster, *Crown Law* (1762 ed.) pp. 217, 218. In the *Trial of Captain Vaughn*, 13 How. St. Tr. 485 (8 Wm. III 1696), the overt act of adherence charged was that of cruising in a small ship in English waters in the service of France with intent to take the king and ships. In dealing with the contention that mere cruising did not amount to an act of aid and comfort, Lord Chief Justice Treby said (pp. 532–533):

> * * * What is the duty of every subject? It is to fight with, subdue, and weaken the king's enemies: and contrary to this, if he confederate with, and strengthen the king's enemies, he expressly contradicts this duty of his allegiance, and is guilty of this treason of adhering to them. But then you say here is no aiding unless there were something done, some act of hostility. Now here is going aboard with an intention to do such acts; and is not that comforting and aiding? Certainly it is. Is not the French king comforted and aided, when he has got so many English

> subjects to go a cruising upon our ships? Suppose they man his whole fleet, or a considerable part of it; is not that aiding? If they go and enter themselves into a regiment, list themselves and march, though they do not come to a battle, this is helping and encouraging; such things give the enemy heart and courage to go on with the war; or else it may be, the French king would come to good terms of peace. * * *

The same holding, that it is immaterial that the treasonable act may not succeed in its ultimate purpose, has been made in cases arising out of World War II. *Haupt* v. *United States*, 330 U. S. 631, 634 (saboteur's application for employment); *Chandler* v. *United States*, 171 F. 2d 921, 941 (C. A. 1), certiorari denied, 336 U. S. 918; *D'Aquino* v. *United States*, 192 F. 2d 338, 373 (C. A. 9), pending on petition for a writ of certiorari, No. 209 Misc.; cf. *Gillars* v. *United States*, 182 F. 2d 962, 977 (C. A. D. C.).

So here, petitioner's acts in trying to force more work out of Toland and Armellino at that immediate moment were of aid and comfort to the enemy, even though he may have failed in getting more work.[39]

2. The other overt acts were also of real aid and comfort to Japan's use of the prisoners for war work, in instilling fear which would tend to make

[39] He obviously succeeded in Armellino's case, and can only be said to have failed in Toland's because his kick caused the prisoner to fall and cut himself. *Supra*, pp. 14–15.

them more amenable to orders, more subservient, more anxious to avoid anything which could bring retaliation or punishment upon them—and thus would aid in the ever-present project of forcing the prisoners to produce as much work as possible. As with the two overt acts ((a) and (j)) discussed separately above (*supra*, pp. 63–67), in their setting the other acts take on particular incriminating significance.[40] The Japanese were using the prisoners for important war work, as petitioner knew, and there was an effort to keep production up and to raise it. *Supra*, pp. 9–10, 11. As shown by the testimony summarized in the Statement, *supra*, pp. 11–13, petitioner himself was constantly concerned with getting work out of the prisoners. It was of obvious aid to this design, *i. e.*, to make the prisoners work hard, to bring about a state of mind expressed by one prisoner when he said, "If we wanted to stay healthy, we stayed busy" (Tr. 1184). Petitioner's actions in the eight overt acts on which he was found guilty rendered the Japanese authorities real assistance by tending to bring about that useful state of mind.

Again, it makes no difference whether the prisoners actually worked harder because of petitioner's brutality, or whether the ore they mined or refined had any appreciable effect on Japan's

[40] Overt Act (g) (*supra*, pp. 16–17) involved punishment directly connected with an early return from work.

combat activities. *Supra,* pp. 66–67. As the First Circuit said in the *Chandler* case (171 F. 2d at 941):

> It does not even matter whether the particular recordings proved under overt acts 17 and 18 were actually broadcast. Chandler's service was complete with the making of the recordings, which thus became available to the enemy to use as it saw fit. It was no part of Chandler's job to put the recordings on the air. His act of making the recording for the enemy is like giving to an enemy agent a paper containing military information, which would be a completed act of aid and comfort, though the enemy agent later lost the paper and thus never put the information to any effective use.

3. The eight overt acts were also acts of real aid and comfort, even if their effect on the prisoners' work be laid aside. These acts all had the direct tendency and aim to render the whole group of prisoners subservient, fearful, docile. Prisoners in that frame of mind are less likely to attempt escape, which would be far from a fanciful project once the Japanese islands were invaded. Subservient prisoners would be less likely to signal American or allied planes, or to seek to overthrow their captors upon an American invasion, or to communicate with scouting parties or invading troops. Prisoners in that frame of mind would require fewer guards and less watching. In short, a will-less and fearful group of prisoners

at Oeyama would undoubtedly be an asset to the Japanese, particularly if an invasion should come.

Moreover, as the quotation from *Vaughn's* case, *supra*, pp. 66–7, makes clear, it has long been recognized that acts which tend to bolster the morale of the enemy ("heart and courage to go on with the war") are acts of aid and comfort. The humiliating treatment of American prisoners of war could very well tend to give heart to the Japanese and create in them a sense of superiority. There were Japanese soldiers at the camp whose morale would directly be affected by seeing the treatment accorded the Americans. It was also very likely that word of such treatment would be spread in the surrounding countryside.[41]

4. For these reasons, petitioner's eight acts of brutality were *all* acts of aid and comfort to the enemy. All of them strengthened or tended to strengthen Japan's war effort; all of them encouraged and advanced its interests. But one overt act of treason, properly proved, is sufficient to sustain the conviction, if all the other elements of

[41] We are somewhat at a loss to understand the significance of petitioner's repeated statements that the prisoners of war were "disarmed labor battalions" who were no longer "soldiers of the United States". Of course, being prisoners of war, they were disarmed and no longer in combat, but they were still American soldiers in the eyes of this country and might again go into combat duty if they escaped or were liberated upon an invasion. And certainly the fact that they were no longer (for the time being) combat soldiers did not give petitioner license to commit acts of hostility against them and their country. Nothing in the law of treason requires that the overt act concern combat soldiers.

treason have been established. *Haupt* v. *United States*, 330 U. S. 631, 641, n. 1; *Chandler* v. *United States*, 171 F. 2d 921, 942 (C. A. 1), certiorari denied, 336 U. S. 918; *Gillars* v. *United States*, 182 F. 2d 962 (C. A. D. C.); *Best* v. *United States*, 184 F. 2d 131, 137 (C. A. 1); *D'Aquino* v. *United States*, 192 F. 2d 338 (C. A. 9), pending on petition for a writ of certiorari, No. 209 Misc.[42] Therefore, since the jury returned special verdicts and findings as to each of the eight overt acts, petitioner's conviction must be sustained unless all eight of the overt acts are held to be insufficient.

III

THE EVIDENCE WAS SUFFICIENT TO PROVE THE OVERT ACTS AND THE INTENT TO BETRAY

A. *The overt acts were proved by two or more witnesses.*—Petitioner's contention that the overt acts were not sufficiently proved by two witnesses does not call for extended discussion.[43] As appears from the Statement, *supra*, pp. 14–18, there were more than two witnesses to all except one

[42] This rule is a sufficient answer to petitioner's contention that the trial judge erred in permitting the jury to report failure of agreement on some of the overt acts submitted to them.

[43] Under the Constitution, the two-witness requirement relates to the evidence needed to convict, and not to indict. *United States* v. *Greiner*, 26 Fed. Cases No. 15,262, at p. 40 (C. C. E. D. Pa); *Charge to Grand Jury*, 2 Wall. Jr. 134, 30 Fed. Cases No. 18,276 (C. C. E. D. Pa.). There is thus no merit in petitioner's claim that he was entitled to inspect the grand jury minutes to ascertain whether two witnesses had testified to each overt act.

of the overt acts.[44] Each of the witnesses who testified as to an overt act was an eye-witness of the commission of that act. They were present, and saw and heard that to which they testified. The Court of Appeals summarized the testimony as to Overt Act (b) (*supra*, pp. 15–16), and added: "We have carefully studied the testimony from the long record and find a plurality of witnesses to each of the alleged overt acts which the jury found to have been committed" by petitioner (R. 543–544; 190 F. 2d, at 520–521).

Petitioner's main argument on this point is based on the fact that the witnesses did not agree as to precise date, the exact time, or as to incidental details. However, as the court below said of Overt Act (b), involving Grant, "While there is some understandable uncertainty as to the exact date, there is little question about the exact occasion and as to the conduct of Kawakita on that occasion" (R. 543; 190 F. 2d 520). The twelve witnesses (other than Grant) varied as to whether the incident took place in April or May, and one witness even said June, but all agreed as to the place, that Grant was the victim, that the act

[44] The direct testimony of the prosecution's witnesses to the eight overt acts of which petitioner was convicted has been printed in Appendix C to the Government's brief in the court below, Appendices to Brief for Appellee, *Kawakita* v. *United States of America*, C. A. 9, No. 12,061, Vol. II, at pp. 16a–179. Copies of the volume of the brief containing this testimony have been lodged with the Clerk, for the convenience of the Court.

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took place in the evening around 4, 4:30, or 5 P. M., and that Kawakita struck Grant in or around the cesspool. Of course, witnesses testifying three years after such an incident will ordinarily not agree on precise dates or collateral details, but there is no doubt in the world that these witnesses were all talking about the same incident and were describing the same act on the part of petitioner, *i. e.* the act charged in Overt Act (b). That is sufficient to sustain the verdict. There is no requirement that the testimony of the two witnesses be identical (*Haupt* v. *United States*, 330 U. S. 631, 640), or even that the same witnesses see or hear the entire act (*id.*, at 636–639, 640).

The same comments are true of the other seven overt acts. There was variance as to details but remarkable agreement as to petitioner's actions on each occasion. As to each, there is no reasonable doubt the witnesses were all testifying as to the same act. At the very least, there was sufficient accord of testimony to permit the jury to find that the witnesses had seen and heard the same act. *Haupt* v. *United States*, 330 U. S. at 639–640.[45]

[45] Contrary to petitioner's intimations, this Court does not review the evidence for itself, in a treason case, to see whether it agrees with the jury's verdict. Once it is satisfied that the overt acts charged are acts of aid and comfort and that two witnesses testified to their commission, so that the case can properly go to the jury, its function is performed. *Haupt* v. *United States*, 330 U. S. 631, 639–640; *Cramer* v. *United States*, 325 U. S. 1, 33, 39.

Petitioner contends that, as to the overt acts which occurred after March 1945, he was entitled to an instruction on alibi since he claimed to have been working as a clerk in the factory at the time and not at the mine. All such overt acts were, however, alleged to have occurred in or near the factory (i. e. smelter) area (Overt Acts (a), (b), (d), (g), (j), (k), *supra*, pp. 14–18).[46] Whether he was actually present when the particular events occurred was an issue of credibility which the jury, on overwhelming evidence, found against him.

B. *There was ample evidence of intent to betray.*—There are three classes of evidence which amply sustain the jury's special finding, as to each of the overt acts, that petitioner cast his lot with and adhered to the enemy, with intent to betray the United States: (i) testimony as to petitioner's remarks to the prisoners to the effect that Japan would win the war, that the United States was losing, that he was going back to the United States as a "big shot", that he wished all Americans were dead, etc.;[47] (ii) the evidence proving

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[46] The factory or smelter adjoined the prisoners' camp. *Supra*, p. 9. The mine was 10 to 12 miles away. *Supra*, p. 10.

[47] Throughout the trial, the jury were warned that this testimony was being received only on the issue of intent to betray which would arise if the jury should find, from the direct testimony of two witnesses, that petitioner did one or more of the overt acts. See *e. g.*, Tr. 600, 651–2, 1278. This caution was repeated in the charge (R. 339, 96 F. Supp. at 846).

the eight overt acts, and evidence of other acts of brutality by petitioner; and (iii) petitioner's own testimony as to his lack of loyalty to this country and his desire to aid Japan. It is settled that the two-witness requirement does not apply to the issue of intent to betray. *Cramer* v. *United States*, 325 U. S. 1, 31–33; *Haupt* v. *United States*, 330 U. S. 631, 642; *Chandler* v. *United States*, 171 F. 2d 921, 944, certiorari denied, 336 U. S. 918.

The first category is summarized in the Statement, *supra*, pp. 11–14, as well as in footnote 13 of the opinion of the court below (R. 535–537, 190 F. 2d at 515–517).[48] These remarks and actions, if believed, clearly reveal petitioner's loyalty to Japan, hatred of Americans and America, desire to force the petitioners to work for and serve Japan—in short, his adherence to the enemy.

The testimony proving the eight overt acts (and other acts of brutality) also furnishes, in itself, strong proof of petitioner's adherence to the Japanese cause. This is a case in which the acts, without more, reveal the treasonable intent with which they were performed. Brutalizing American prisoners in order to make them work and to render them subservient are not innocent acts which can be done with a benign pur-

[48] A good portion of the testimony summarized in the Statement, *supra*, and in footnote 13 of the opinion below has been reprinted in the Appendix to petitioner's Opening Brief in the court below, at pp. 69–106. We understand that copies of this brief have been lodged with the Clerk, for the convenience of the Court.

pose. They stamp the doer as one who is hostile and disloyal to the United States, particularly where it is no part of his employment either to punish or force labor from the prisoners.[49]

The third class of evidence on this issue is supplied by petitioner's own testimony that in the period in question he felt no loyalty to the United States (Tr. 4234) and that he intended to do everything he could to help Japan (Tr. 4227). *Supra*, p. 13. Alone, and together with the other evidence, these admissions were sufficient to establish his intent to betray.

In connection with the issue of intent of betray, it is relevant to recall that the jury were instructed that if they found that petitioner "did not do the act or acts willingly or voluntarily, but so acted only because performance of the duties of his employment required him to do so or because of other coercion or compulsion" then they must acquit (R. 344; 96 F. Supp. 847). *Supra*, pp. 52–55.

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[49] Conceivably, such acts could be done with purely personal or privately sadistic motive:. But there is no claim to that effect, and in any case the jury would clearly be entitled to find, on all the evidence, that petitioner performed the acts with intent to betray this country. See *infra*, pp. 77–78.

Of course, even if such private and personal motives were mixed with the intent to betray, of which there is no evidence or claim, the crime of treason would be committed. See *Haupt* v. *United States*, 330 U. S. 631; *United States* v. *Athens Armory*, 24 Fed. Cases 878, at 883, No. 14,473 (N. D. Ga.); and the cases cited in fn. 37, *supra*—and almost all other treason cases.

In finding guilt and in answering the special interrogatories under this charge, the jury has found that petitioner did not do the treasonable acts because they were required of him by his employment or because he was otherwise coerced; his actions were done willingly and voluntarily. He had an uncoerced purpose and that voluntary aim the jury found, on more than sufficient evidence, was to adhere to Japan.[50]

Because petitioner seems to suggest that this Court should decide for itself whether petitioner intended to betray his country, we close our discussion of this point with a reference to the Court's answer to the similar contention in the *Haupt* case. Hans Haupt contended that the acts of aid and comfort which he performed for his son Herbert were all done out of a father's desire to aid his son as an individual. The Court held that "It was for the jury to weigh the evidence that the acts proceeded from parental solicitude against the evidence of adherence to the German cause" (330 U. S. at 641) and "Such arguments

[50] An American who inflicted punishment on other prisoners of war, at the demand and direction of the Japanese, for the purpose of saving the whole prisoner of war group from worse treatment would probably not be found guilty of treason because, though his act might be of aid and comfort to the enemy, he would have no purpose or intent to betray the United States. But petitioner cannot fall into that class. The jury found, on ample evidence, that he did have the intent to betray, and there is no evidence whatever that he performed his acts from other, worthier purposes.

are for the jury to decide" (at 642). To the same effect, see *Chandler* v. *United States*, 171 F. 2d 921, 944 (C. A. 1), certiorari denied, 336 U. S. 918; *Gillars* v. *United States*, 182 F. 2d 962, 966–968 (C. A. D. C.); *D'Aquino* v. *United States*, 192 F. 2d 338, 351–353 (C. A. 9), pending on petition for a writ of certiorari, No. 209 Misc.[51]

IV

THERE WAS NO ERROR IN PERMITTING THE GOVERNMENT TO MAKE LIMITED USE, FOR THE PURPOSE OF IMPEACHMENT, OF STATEMENTS MADE BY PETITIONER TO F. B. I. AGENTS AFTER HIS ARRAIGNMENT

The Government placed on the stand the Federal Bureau of Investigation agent who arrested petitioner (Tr. 2843). The agent testified that petitioner was taken before a United States Commissioner within two hours and arraigned (Tr. 2846–2847). At that point, at the request of petitioner's counsel, the jury was excused (Tr. 2849). The agent then testified, out of the presence of the jury, that after the arraignment petitioner was taken to the office of the F. B. I. for questioning (Tr. 2861). The agents questioned petitioner for about an hour, and then spent another hour and a quarter reducing his statement to writing (Tr. 2861–2862). Petitioner signed the

[51] Petitioner complains of the court's failure to use his definition of "betray" in elaborating on that word, at the jury's request, during its deliberations. We deal with this contention in fn. 56, *infra*, p. 85.

statement, after first refusing to do so (Tr. 2879–2880).

The trial judge thought the jury might give a formal written statement the weight of a confession, which he thought could not properly be used to convict of treason since not made in open court. He ruled that, although the statement was voluntary, he would exclude it as a matter of policy. (Tr. 2988–2993.)

During petitioner's cross-examination, he was asked whether he had not told a man named Mori that he hoped Japan would win the war, and petitioner replied that the F. B. I. men had told him Mori had attributed the statement to him (Tr. 4240). He was then asked whether, while working at the camp, he knew the use being made of the nickel ore there mined. When he replied that he did not, he was asked whether he had not told the F. B. I. Agents that the nickel ore was used to make steel (Tr. 4241, 4243). Petitioner's counsel objected to the question on the ground that the statement had been excluded from evidence (Tr. 4243–4252). In the course of argument on the issue, out of the presence of the jury, the court stated that, in its original ruling excluding the statement, it had gone beyond strict legal requirements, but that nevertheless it would not permit use of the written statement (Tr. 4254–4255). The court did, however, allow Government counsel to ask petitioner whether he had

not told the F. B. I. that the nickel was used to make steel (Tr. 4262–4263).

Petitioner then replied that he had told the agents that, when he returned from China in 1944 and was told that the company was under Government control, he found out that the material was used for war purposes (Tr. 4263).

That was the only use made of petitioner's statement to the F. B. I.[*]

Petitioner's contention, that such limited use of petitioner's oral statement to the F. B. I. agents constituted error, is clearly without merit. As the district judge indicated, he had, in excluding the written statement, gone beyond legal requirements. The statement, made after petitioner had been arraigned, following a brief period of questioning, was clearly admissible in evidence. *United States* v. *Carignan,* 342 U. S. 36; *McNabb* v. *United States,* 318 U. S. 322, 346. And it is well established that, while an extra-judicial confession or admission may not be used to supply any deficiency in the required two-witness proof, such confession or admission may properly be admitted in addition to the two-witness proof. *Haupt* v. *United States,* 330 U. S. 631, 642–643; *Trial of Francis Willis,* 15 How. St. Tr. 614, 623–625 (1710); *Respublica* v. *Roberts,* 1 Dall. 39 (Pa. 1778); *Respublica* v. *McCarty,* 2 Dall. 86 (Pa.

[*] The prosecutor did ask whether petitioner had not said, "Well, I had it coming to me," but the court ordered the question and answer stricken (Tr. 4264).

1781); *Case of Fries,* Fed. Case No. 5,126, 9 Fed. Cas. at 909 (C. C. D. Pa. 1799); Foster, *Crown Law* (1762 ed.) 241–242.

In view of this rule, the very limited use of petitioner's statement to the F. B. I. was clearly proper. It is a proper method of impeachment to ask a witness whether he had not previously made a statement contrary to his testimony on the stand. *The Charles Morgan,* 115 U. S. 69, 77–78; *Conrad* v. *Griffey,* 16 How. 38, 46; *United States* v. *Angelo,* 153 F. 2d 247, 251 (C. A. 3); *Hawkins* v. *United States,* 39 F. 2d 294, 295 (C. A. D. C.). Petitioner admitted that he had made the contradictory statement, and admitted the truth of the prior statement.

V

THE JURY WAS NOT COERCED

A. The case was submitted to the jury; after a two months trial, at 3:30 p. m., Wednesday, August 25, 1948. The jury had been instructed to take all the time it felt necessary, eat leisurely and go to their hotel when they wished (Tr. 5607). It deliberated Wednesday for 4 hours, 10 minutes. 96 F. Supp. 881.

At 10:15 a. m., on Thursday, the jury sent a request for the transcript (Tr. 5588). It was agreed by counsel for both sides that it would be better to have the testimony which the jury desired to review read in open court (Tr. 5590). Thereupon, the jury was brought into the court-

room and the testimony requested was read to them until just before noon (Tr. 5593). At 1:30 p. m., the reading of the testimony was resumed (Tr. 5595). The exact time that the jury retired does not appear, but at 6:00 p. m., the jury were taken to dinner. The time of actual deliberation in the jury room, on Thursday, was thus not more than four hours. 96 F. Supp. 831, 852–953.

On Friday, the jury deliberated for 7 hours, 96 F. Supp. 832. On Saturday, at 3:00 p. m. after deliberating for 4½ hours, the jury sent word that it was unable to arrive at a verdict, and that a majority felt there was no probability that it would do so (Tr. 5597). Pursuant to a stipulation, the bailiff advised the jury that the court wished it to deliberate further. The jury then asked to be relieved from further deliberations until Monday morning, which request was, also in accordance with a stipulation, granted (Tr. 5602–5610). 96 F. Supp. 832, 853. Thus, no more than 21 hours had been spent in actual deliberation up to Saturday, August 28, 1948. The jury rested on Sunday. 96 F. Supp. 832.

On Monday morning, the foreman sent a note requesting advice from the court (Tr. 5616, 5618; 96 F. Supp. 832, 853). The jury was called into the court room, and the discussion revealed that personal animosities had developed (Tr. 5620–5627, esp. 5620, 5622; 96 F. Supp. 853–854). One juror asked if it would be out of form to elect

a new foreman, and was told that the jury was entitled to elect its foreman at any time (Tr. 5627; 96 F. Supp. 855).

The court then gave the jury supplemental instructions (Tr. 5627–5632; 96 F. Supp. 856–857) used in *United States* v. *Allis*, 73 Fed. 165, 182–183 (C. C. E. D. Kans.), affirmed, 155 U. S. 117, 123, and repeatedly approved in the same or substantially the same form. E. g., *Allen* v. *United States*, 164 U. S. 492, 501–502; *Wright* v. *United States*, 175 F. 2d 384, 388 (C. A. 8), certiorari denied, 338 U. S. 873; *Lias* v. *United States*, 51 F. 2d 215, 218 (C. A. 4), affirmed, 284 U. S. 584.[53] He omitted two portions of the *Allen* instruction, one omission certainly not being harmful to petitioner,[54] and the other clearly favorable.[55]

To the *Allen* instruction, the court added the following (Tr. 5628–5629; 96 F. Supp. 856):

> It is unnecessary for me to say again that the court does not wish any juror to

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[53] Cases from every circuit are collected in 96 F. Supp. at 857.

[54] "The court and jury are here to come to a just and righteous result. No doubt you are as anxious to reach it as am I. So anxious is the court that, having spent now two weeks in the trial of this cause, I am willing to stay here another, if by that means we may be able to reach a just and proper result in this trial." 73 Fed. at 183.

[55] "In order to acquit the defendant of the 17 charges submitted to you, you must consider all of them, and find that he is not guilty of any of them. On the other hand, if you shall find that he is guilty of any of them, you should return a verdict of guilty." 73 Fed. at 183.

surrender his or her conscientious convictions. As I stated at the time the case was submitted to you, do not surrender your honest convictions as to the weight or effect of evidence solely because of the opinion of other jurors, or for the mere purpose of arriving at a verdict.

He also added (Tr. 5631; 96 F. Supp. 856):

Let me repeat again so that you will not feel that any remarks I have made are intended to put any coercion or pressure upon you: No juror is expected to yield a conscientious conviction he or she may have as to the credibility of any witness or as to the weight or effect of any evidence, but, as I have previously said, it is your duty, members of the jury, to agree, unless after a full and impartial consideration of all the evidence with your fellow jurors, to agree would do violence to your individual judgment and conscience.

There has been some suggestion here—there was Friday—that some of you were very tired. Perhaps I should have suggested to you at the outset that you may be as leisurely in your deliberations as the occasion and circumstances may require. Sometimes jurors may fail to agree because they hurry too much to try to agree. Sometimes people do that.

I do not speak in any critical vein. We are dealing with an attempt to get 12 human beings to arrive at a common conclusion as to the truth.

> You will remember at all times if any doubt remains in your mind, any reasonable doubt as to the guilt, the defendant is entitled to your verdict of acquittal.

His final words before the jury retired that day were (Tr. 5632; 96 F. Supp. 857):

> * * * And remember, again, that no juror is expected to surrender his honest convictions if, after full deliberation and attention to the views of his or her fellow jurors, he or she remains convinced of the correctness of his or her stand on any matter involved.

The jury deliberated that afternoon (Monday) for four and one-half hours, 96 F. Supp. at 832. On Tuesday morning, at 11:20 a. m., the jury, through a different foreman, requested clarification of the instructions (Tr. 5639, 5641–5642; 96 F. Supp. 832–833, 857). When called into the court room and asked to be more specific, they expressed a wish for further explanation of the nature of a special verdict, and of the words "betray" or "felonious" (Tr. 5642). The judge gave the explanations called for (Tr. 5642–5661; 96 F. Supp. 858–859).[56] There was at that time

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[56] In regard to the word "betray" the judge read a definition from a dictionary he had at his desk, and explained the meaning, stressing the fact that the petitioner could not be convicted if the jury found that he believed he was not an American citizen (Tr. 5650–5651, 5657, 5658; 96 F. Supp. 858–859). Counsel and jury were seemingly satisfied at the time (Tr. 5661). Four hours later petitioner presented the

no suggestion of inability to reach an agreement. No other communication was received until the verdict was returned.

The jury deliberated that afternoon (Tuesday) until 5:40 p. m., and on Wednesday for six hours from 9:25 a. m. to 5:00 p. m., with time out for lunch. The verdict was returned at 3:47 p. m. on Thursday, September 2, 1948, after almost five hours of deliberation on that day. 96 F. Supp. at 833.

In aggregate, the labors of the jury totaled about 48 hours, over eight days' time (never over seven hours, five minutes in one day, and with a complete day of rest on the intervening Sunday), including the various times spent in supplementary proceedings in the court room.

The testimony had lasted two months and included a transcript of 5,000 pages from 60 witnesses, plus dozens of exhibits. Counsel had argued to the jury for four days. Thirteen overt acts of treason were submitted to the jury, requiring the consideration of 104 special interrogatories. The jury agreed on eight overt acts and 64 special interrogatories.

B. The issue of coercion has been thoroughly canvassed in both courts below. 96 F. Supp. at

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court with the Webster's Dictionary definition of betray (R. 284). His claim of error because the court did not then read that definition, substantially the same as the one read by the court, is clearly without merit.

829–835; 190 Fed. at 521–528. As the district judge pointed out, 96 F. Supp. at p. 835:

> If the verdict here were coerced as the defendant contends, then it must be said that the jury convicted the defendant in order to be excused to go home. . That thought suggests inquiry why, if led to convict the defendant only because they were in a hurry to go home, did the jury not bring in a verdict on only one overt act, as they were told they might do. It seems unlikely that, in their assumed haste, the jury would choose to answer 64 interrogatories after they had been instructed that answers to only 8 would suffice for a conviction.
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> * * * * *
>
> Far from indicating coercion, it is my opinion that the time element involved, the daily hours of deliberation, the change of foreman on Monday, the absence of any hint or intimation on the part of any member of the jury that there existed the slightest desire to be discharged at any time from Monday until the jury returned into court with their verdict on Thursday afternoon,—all indicate that the jurors were taking their time as they should, and as the court had instructed them they might do. Furthermore, the factors just mentioned, and others above discussed, point to a calm, deliberate and conscientious consideration of the evidence with respect to each of the 13 overt acts charged, and a

> unanimous verdict voicing the considered opinion of each juror as to 8 of the overt acts, without surrender of the conscientious convictions of any of the jurors.

To this, the Court of Appeals added (190 F. 2d at 527–8):

> The contested instructions were not coercive in effect. They were given on Monday, August 30, 1948. The final words of the trial court on this occasion were that no juror was expected to surrender his honest convictions if, after full deliberation and attention to the views of his or her fellow jurors, he or she remained convinced of the correctness of his stand. The verdict was not rendered until 3:45 P. M. on Thursday, September 2, 1948. The jury agreement after three days had elapsed following the final instructions to the jury, as it seems to us, was because the jurors came to agreement after the storms of personality clashes had been cleared away by the presiding judge. No complaint was made nor was any indication given to the effect that personal differences occurred during this period. It is far more likely that the earnest and thorough talk to the jury by the judge impressed the members with their duties to eliminate personal conflict of temperament and weigh the evidence in the cold scale of impersonal logic.

As pointed out above (p. 83), the *Allen* instruction has been approved time and time again. In using it here, the trial judge added

material strongly emphasizing that no juror was expected to surrender his convictions, that he was putting no coercion upon them, that they could convict only if they had no reasonable doubt of guilt. *Supra*, pp. 83-85. See also the earlier colloquies reported at 96 F. Supp. 854[57] and 855.[58] There can be no question that, as far as it was possible for the trial judge to do so, the jurors were made aware that the verdict was to be their own free one, that no juror should surrender his honest beliefs, and that the reasonable doubt standard was to be maintained at all times.[59]

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[57] "No juror is expected to surrender his or her conscientious convictions as to the credibility of witnesses or as to the weight of the respective evidence for the mere purpose of arriving at a verdict" (Tr. 5321).

[58] "When a situation like this is reached, the court tries to be of assistance to the jury. Frequently the position is made—and in many instances, perhaps, properly so—that the court is attempting to coerce the jury or to force the jury to arrive at a verdict.

"A verdict is desirable, but it is only desirable if it is a true verdict. It is only a true verdict if it represents the individual judgment, the honest individual judgment of each juror". (Tr. 5626.)

[59] *Bollenbach* v. *United States*, 326 U. S. 607, cited by petitioner, is irrelevant since it involved a supplemental instruction which stated the substantive law incorrectly, and a jury verdict returned five minutes after that erroneous instruction. *Peterson* v. *United States*, 213 Fed. 920, 924 (C. A. 9), also relied on by petitioner, contains some language favorable to his contention, but was later distinguished and limited by *Shea* v. *United States*, 260 Fed. 807 (C. A. 9) (supplementary instruction given after jury out 30 hours).

As for the length of time the jury deliberated, we submit that the trial court reached the correct result when it concluded: "In all the circumstances the duration of the jury's deliberations at bar was entirely reasonable." 96 F. Supp. at 833. These circumstances included the length of the trial, the nature and gravity of the crime charged and of the case, the number of overt acts and special interrogatories submitted. *Supra*, p. 86. They also included the fact that, though the jury deliberated on seven days, it had much rest, its deliberations were in relatively short sessions, and it never deliberated (including court proceedings) for more than the normal daily period of work. *Supra*, pp. 81–82, 85–86. Finally, it appeared that the jury's early deliberations were marred by personal friction but that after the supplemental instructions of Monday, August 30, a new foreman was selected and there was no longer any indication of inability to agree, or of anything other than sustained discussion and deliberation on the issues put before them. Discriminating answers were made to these questions; the jury did not convict on the basis of the first eight overt acts. Petitioner's counsel had himself indicated on Saturday, August 28, that it would be proper to keep the jury deliberating until Wednesday (Tr. 5599–5600); it was actually out until Thursday.

As the court below held, "there is nothing tangible in the record to override the presumption that the verdict returned was the result of honest and

conscientious agreement of twelve minds" (R. 556; 190 F. 2d at 528). Cf. *Haupt* v. *United States*, 330 U. S. 631, 643, where this Court summarily disposed of an argument that the jury had been coerced since it deliberated 28 hours without sleep (see 152 F. 2d 771, 799); *Hyde* v. *United States*, 225 U. S. 347, 383 (three days and nights).[60]

C. The suggestion of impropriety during the deliberations of the jury is wholly unwarranted. In his motion for a new trial, petitioner had alleged that the jury had been improperly influenced, and, despite the fact that he did not support his motion by affidavits, the court afforded him a full hearing with opportunity to present the oral testimony of witnesses, including the jurors (Tr. 5700–5707). The testimony at that hearing (Tr. 5707–5787) completely refutes petitioner's innuendos.

There was obviously no improper separation in permitting the jury to sleep in separate rooms or to eat at separate tables. *Lucas* v. *United States*, 275 Fed. 405, 406 (C. A. 8), certiorari denied, 258 U. S.

[60] Petitioner's attack on the constitutionality of Rule 24 (c), F. R. Crim. P., permitting alternate jurors to sit until the time for deliberation, was answered in *Robinson* v. *United States*, 144 F. 2d 392, 397 (C. A. 6), affirmed, 324 U. S. 282. See also *American Tobacco Co.* v. *United States*, 147 F. 2d 93, 117 (C. A. 6), affirmed, 328 U. S. 781. Cf. *Gillars* v. *United States*, 182 F. 2d 962, 980 (C. A. D. C.). Petitioner had a verdict of twelve jurors as the Constitution requires. Each time the jurors left the court room, they were admonished not to communicate (*e. g.*, Tr. 4179). There is thus no basis for the suggestion that the alternates may have influenced the others.

620. The jurors were so little permitted to come and go as they pleased that, when one of their members became ill, the other jurors were not allowed to go out to breakfast until it was determined whether he was well enough to go with them (Tr. 5769). When one of the jurors went to the barber shop he was accompanied by a bailiff (Tr. 5735). When the jurors were in the lobby of the hotel in the evening, bailiffs were with them in the lobby (Tr. 5778). Cf. *Shockley* v. *United States*, 166 F. 2d 704, 718 (C. A. 9), certiorari denied, 334 U. S. 850.

The alleged "outsiders" who had contact with the jurors during the period of deliberations were doctors called under the following circumstances:

(i) On Sunday, August 29, the day during which the jury was allowed to rest without deliberating (see, *supra*, p. 82) the bailiff informed the judge that the original foreman, Mr. Andrews, was ill. The judge instructed him to call the house physician (Tr. 5709). The physician found Mr. Andrews in a state of nervous exhaustion and prescribed a sedative (Tr. 5709). There was no discussion about the case (Tr. 5713). At noon, Mr. Andrews said he felt all right and went to breakfast with the other jurors (Tr. 5727). During deliberations the next day he appeared well and took an active part in the discussion (Tr. 5730).[61]

[61] Mr. Andrews was the original foreman who was apparently displaced when the jury resumed deliberations after the proceedings in court on Monday (see, *supra*, pp. 82–3, 85).

(ii) On September 1, another juror complained of itching and pain in the ear and was examined by two physicians of the Public Health Service, in the presence of the full jury, at the loading platform of the bus which was used to take the jurors for their meals. The diagnosis was eczema of the external canal. The treatment took about five minutes and there was no discussion of the case (Tr. 5716–5724). The judge stated that the bailiff informed him of these incidents and that he saw no reason to bother counsel with such details (Tr. 5770).

It was agreed that it was hot during the deliberations which were conducted in August (Tr. 5731–2). It appeared that one woman juror was given smelling salts on one occasion but recovered within 10 or 15 minutes (Tr. 5739). Another, who had eaten turkey and strawberry shortcake, and was apparently allergic to strawberries, vomited after dinner (Tr. 5774). At the request of petitioner's counsel, the jury was taken out of the courtroom the back way because on one occasion there were pickets, unconnected with the case, in front (Tr. 5775), and on another a marine band was conducting patriotic services (Tr. 5776). Petitioner's counsel made some veiled oral intimations at the hearing on the new trial motion that one of the bailiffs had tried to influence the jury during its deliberations, but Juror Clancy, to whom he put his questions, did

not support the charge. (Tr. 5740–5748, 5752).[62] All this hardly adds up to petitioner's description of a "sordid picture" of "high tension, passion and heat."

As to petitioner's contention that he was not allowed to prove lack of prejudice, the fact is that the judge stated, before the hearing closed, that he wanted "to be absolutely clear now that there is no contention to be made that the court limited you [petitioner's counsel] in connection with your examination of jurors. If you have anything further to ask any of the jurors who are here, you may do so at this time." Petitioner's counsel replied that he had nothing further to ask (Tr. 5782–5783). The only limitation arose out of the fact that petitioner's counsel stated he believed that one juror, Mrs. Zeigler, had been intimidated. When he admitted that this juror was not present at the hearing, and that he had not subpoenaed her, the judge stated that he would hear no more on that issue although he would grant a continuance if petitioner so desired (Tr. 5748–5750). It is evident that petitioner was awarded greater opportunity than was his due to present any evidence he might have to

[62] Juror Clancy, who was in his sixties, became ill during the questioning and had to be assisted from the witness chair by a doctor (Tr. 5757). Petitioner never requested that he be recalled or that the matter be continued until further testimony could be obtained from him (see Tr. 5779, 5782).

show prejudice, and that he failed to do so because there was no impropriety.[63]

VI

THE SENTENCE IMPOSED WAS WITHIN THE DISTRICT COURT'S STATUTORY DISCRETION AND IS NOT REVIEWABLE[64]

Petitioner cannot attack in the appellate courts the sentence of death imposed on him by the trial judge. The treason statute under which he was tried and convicted, and the present treason act, both provide that whoever is guilty of treason "shall suffer death" or in the court's discretion

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[63] There was also testimony that, during the trial, a gentleman approached two women jurors during lunch time and said, without explanation, that he was interested in the case because of Latvala (a victim mentioned in one of the overt acts on which the jury did not agree), whom he apparently had not known. He also said that one of the alternate jurors seemed to be a pleasant woman (Tr. 5760–5766). It also appeared that one day during the trial, when Mr. Andrews was coming to court by streetcar, a stranger, sitting beside him who was reading a newspaper, made some remark about the case (Tr. 5768).

[64] Sufficient answers to petitioner's contentions that the Southern District of California was an improper venue because he was not "found" therein, and that he should have been tried in Japan, are contained in *Chandler* v. *United States*, 171 F. 2d 921, 931–933 (C. A. 1), certiorari denied, 336 U. S. 918, *Gillars* v. *United States*, 182 F. 2d 962, 971–973 (C. A. D. C.), and *Best* v. *United States*, 184 F. 2d 131, 137 (C. A. 1). See also *Kerr* v. *Shine*, 138 Fed. 61 (C. A. 9); *United States* v. *Townsend*, 219 Fed. 761 (S. D. N. Y.).

a term of imprisonment. Section 2 of the former Criminal Code, Act of March 4, 1909, c. 321, Sec. 2, 35 Stat. 1088, 18 U. S. C. 2 (1946 ed.); 18 U. S. C. (Supp. IV) 2381 (Act of June 25, 1948, c. 645, 62 Stat. 683, 807). This has been the statutory punishment for treason since 1790. Act of April 30, 1790, c. IX, Sec. 1, 1 Stat. 112.

The sentence of death was therefore within the limits prescribed by the statute, and cannot be reviewed. "If there is one rule in the federal criminal practice which is firmly established, it is that the appellate court has no control over a sentence which is within the limits allowed by a statute." *Gurara* v. *United States*, 40 F. 2d 338, 340–341 (C. A. 8). See *Blockburger* v. *United States*, 284 U. S. 299, 305.[65] A sentence within the statutory limits cannot be set aside by an appellate court as arbitrary, excessive or cruel and unusual punish-

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[65] Other Court of Appeals decisions announcing this rule include *Rosenberg* v. *United States*, C. A. 2, No. 22201, decided February 25, 1952, slip op., pp. 700–701; *United States* v. *Ward*, 173 F. 2d 628, 630 (C. A. 2); *United States* v. *Gottfried*, 165 F. 2d 360, 368 (C. A. 2); *Hodgskin* v. *United States*, 279 Fed. 85, 94 (C. A. 2); *Voege* v. *United States*, 270 Fed. 219 (C. A. 2); *Carpenter* v. *United States*, 280 Fed. 598, 601 (C. A. 4); *Peterson* v. *United States*, 246 Fed. 118, 119 (C. A. 4); *Beckett* v. *United States*, 84 F. 2d 731, 732–733 (C. A. 6); *Scala* v. *United States*, 54 F. 2d 608, 611–612 (C. A. 7); *Wallace* v. *United States*, 243 Fed. 300, 310 (C. A. 7); *Russell* v. *United States*, 119 F. 2d 686, 689 (C. A. 8); *Cochran* v. *United States*, 41 F. 2d 193, 207 (C. A. 8); *Muench* v. *United States*, 96 F. 2d 332, 336 (C. A. 8); *Feinberg* v. *United States*, 2 F. 2d 955, 958 (C. A. 8); *Wilson* v. *United States*, 145 F.

ment.[66] The defendant's recourse is to the trial judge under Rule 35 of the Federal Rules of Criminal Procedure, or to executive clemency.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be affirmed.

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2d 734, 736 (C. A. 9); *Cardenti* v. *United States*, 24 F. 2d 782, 783–784 (C. A. 9); *Vlassis* v. *United States*, 3 F. 2d 905, 906 (C. A. 9); *Smith* v. *United States*, 3 F. 2d 1021 (C. A. 9); *Freeman* v. *United States*, 243 Fed. 353, 357 (C. A. 9).

[66] The death penalty was imposed in the World War II treason case of *Stephan* v. *United States*, 133 F. 2d 87 (C. A. 6), certiorari denied, 318 U. S. 781, stay of execution ordered, 318 U. S. 746, rehearing denied, 319 U. S. 783 (see also 50 F. Supp. 738 (E. D. Mich.). The sentence was commuted.

APPENDIX

Section 401 of the Nationality Act of 1940, 54 Stat. 1137, 1168, as amended, 8 U. S. C. 801, provides:

> A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> (a) Obtaining naturalization in a foreign state, either upon his own application or through the naturalization of a parent having legal custody of such person: *Provided, however,* That nationality shall not be lost as the result of the naturalization of a parent unless and until the child shall have attained the age of twenty-three years without acquiring permanent residence in the United States: *Provided further,* That a person who has acquired foreign nationality through the naturalization of his parent or parents, and who at the same time is a citizen of the United States, shall, if abroad and he has not heretofore expatriated himself as an American citizen by his own voluntary act, be permitted within two years from the effective date of his [sic] Act to return to the United States and take up permanent residence therein, and it shall be thereafter deemed that he has elected to be an American citizen. Failure on the part of such person to so return and take up permanent residence in the United States during such period shall be deemed to be a determination on the part of such person to discontinue his status as an American citizen, and such person shall be forever estopped by such failure from

thereafter claiming such American citizenship; or

(b) Taking an oath or making an affirmative or other formal declaration of allegiance to a foreign state; or

(c) Entering, or serving in, the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he has or acquires the nationality of such foreign state; or

(d) Accepting, or performing the duties of, any office, post, or employment under the government of a foreign state or political subdivision thereof for which only nationals of such state are eligible; or

(e) Voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory; or

(f) Making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State; or

(g) Deserting the military or naval forces of the United States in time of war, provided he is convicted thereof by court martial and as the result of such conviction is dismissed or dishonorably discharged from the service of such military or naval forces: *Provided,* That notwithstanding loss of nationality or citizenship or civil or political rights under the terms of this or previous laws by reason of desertion committed in time of war, restoration to active duty with such military or naval forces in time of war or the reenlistment or induction of such a person in time of war with permission of competent military or naval authority, prior or subsequent to January 20, 1944, shall be

deemed to have the immediate effect of restoring such nationality or citizenship and all civil and political rights heretofore or hereafter so lost and of removing all civil and political disabilities resulting therefrom; or [the *proviso* was added by the Act of January 20, 1944, c. 2, sec. 1, 58 Stat. 4]

(h) Committing any act of treason against, or attempting by force to overthrow or bearing arms against the United States, provided he is convicted thereof by a court martial or by a court of competent jurisdiction; or

(i) Making in the United States a formal written renunciation of nationality in such form as may be prescribed by, and before such officer as may be designated by, the Attorney General, whenever the United States shall be in a state of war and the Attorney General shall approve such renunciation as not contrary to the interests of national defense; or [added by the Act of July 1, 1944, c. 368, sec. 1, 58 Stat. 677]

(j) Departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the land or naval forces of the United States [added by the Act of September 27, 1944, c. 418, sec. 1, 58 Stat. 746].

Section 402 of the Nationality Act of 1940, 8 U. S. C. 802, provides:

A national of the United States who was born in the United States or was born in any place outside of the jurisdiction of the United States of a parent who was born in the United States, shall be presumed to

have expatriated himself under subsection (c) or (d) of section 401, when he shall remain for six months or longer within any foreign state of which he or either of his parents shall have been a national according to the laws of such foreign state, or within any place under control of such foreign state, and such presumption shall exist until overcome whether or not the individual has returned to the United States. Such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, or to an immigration officer of the United States, under such rules and regulations as the Department of State and the Department of Justice jointly prescribe. However, no such presumption shall arise with respect to any officer or employee of the United States while serving abroad as such officer or employee, nor to any accompanying member of his family.

Section 408 of the Nationality Act of 1940, 8 U. S. C. 808, provides:

> The loss of nationality under this Act shall result solely from the performance by a national of the acts or fulfillment of the conditions specified in this Act.

Section 410 of the Nationality Act of 1940, 8 U. S. C. 810, provides:

> Nothing in this Act shall be applied in contravention of the provisions of any treaty or convention to which the United States is a party upon the date of the approval of this Act [October 14, 1940].

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